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United States
Circuit Court of Appeals
For the Ninth Circuit.

W. G. SIMPSON and S. D. SIMPSON,
Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA,
Defendant in Error.

TRANSCRIPT OF RECORD

*Upon Writ of Error From the United States Dis-
trict Court of the District of Idaho,
Southern Division.*

Filed

MAY 11 1915

United States
Circuit Court of Appeals
For the Ninth Circuit.

W. G. SIMPSON and S. D. SIMPSON,
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*In the District Court of the United States Within
and for the District of Idaho, Southern Division.*

February Term, 1915.

THE UNITED STATES OF AMERICA,

vs.

S. D. SIMPSON and W. G. SIMPSON,

Defendants.

INDICTMENT.

*CHARGE: Issuing Certificate of Deposit with
Intent to Injure and Defraud. Vio. Sec. 5209
R. S. U. S.*

The Grand Jurors of the United States of America, being first duly impaneled and sworn, within and for the District of Idaho, Southern Division, in the name and by the authority of the United States of America, upon their oaths, do find and present:

That heretofore, to-wit: on or about the 27th day of March, 1913, at Caldwell, in the County of Canyon and State and District of Idaho, and within the jurisdiction of this court, one S. D. Simpson, being then and there the Cashier of a certain national banking association then and there known and designated as "The American National Bank of Caldwell", which said association had been theretofore created and organized under and by virtue of an act of Congress entitled "An Act to Provide a National Currency secured by a Pledge of United States Bonds, and to Provide for the Circulation and Redemption thereof", approved June 3, 1864, and which said association was then and there acting

and carrying on a banking business at the City of Caldwell in the said district under the said act of Congress and acts amendatory thereto, and the business of the said association being then and there directed by a board of directors duly qualified thereunto, and which said association was then and there authorized to issue and put forth, in accordance with law, certificates of deposit drawn upon said association, did wilfully, unlawfully and feloniously, and with the intent to injure and defraud said association, and without the authority of the said directors of the said association, issue and put forth a certain certificate of deposit of said association, which said certificate of deposit therein and thereby certified that there had been deposited by one W. G. Simpson in and with said association, on the date last aforesaid, the sum of Two Thousand Five Hundred Dollars (\$2,500.00), which said certificate of deposit was then and there in words and figures following, to-wit:

“The Monticello Banking Co.,
Monticello, Ky., 9715.

THE AMERICAN NATIONAL BANK, 1549,
OF CALDWELL.

No. 1991—Int.	\$2,500.00
	62.50
	<hr/>
	\$2,562.60

Caldwell, Idaho, March 27, 1913.

CERTIFICATE OF DEPOSIT.

Not Subject to Check.

W. G. Simpson has deposited in this Bank Twenty-five Hundred & No-100 Dollars payable to the order of himself in current funds on the return of this Certificate properly endorsed six months after date, with interest at 5 per cent per annum. No interest after maturity.

S. D. SIMPSON, Cashier.

Due Sept. 27th."

In the center of the face of said Certificate of Deposit appears a circle with a capital C in pad or purple ink, and which said Certificate of Deposit after having been so issued and put forth as afore-said has been on the back endorsed as follows:

"W. G. Simpson. All prior endorsements guaranteed. Pay to the order of any bank or banker. Sept. 22, 1913. The Monticello Banking Co., 73-258 Monticello, Ky. W. L. Baker, Cashier. 9-22—9715.

92-50. Previous endorsements guaranteed. Pay any bank or banker or order. Sep. 27, 1913, First National Bank, Caldwell, Idaho. W. P. Lyon, Cashier. 92-50.

Pay to the order of First Nat. Bank. All prior endorsements guaranteed. First National Bank of Chicago. 2-1 Sep. 24, 1913. 2—H. A. Howland, Cashier.

All prior endorsements guaranteed pay to the order of any bank or banker, Sep. 23, 1913. Please report by our No. 3204, National Bank of Kentucky, Louisville, Ky. H. D. Ormsby, Cashier."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further find and present, that the said W. G. Simpson, to whom said Certificate of Deposit was then and there issued and put forth as aforesaid, did not then and there, to-wit, at the time the said Certificate of Deposit was so issued and put forth by the said S. D. Simpson, cashier as aforesaid, have on deposit with said National Banking Association, an amount of money then and there equal to the amount then and there specified in said Certificate of Deposit, to-wit, the amount of Two Thousand Five Hundred Dollars (\$2,500.00), or any amount or sum of money whatsoever, as he, the said S. D. Simpson, then and there well knew, and so the said S. D. Simpson did at the time aforesaid and in the manner and form aforesaid, wilfully, unlawfully, and feloniously, and with intent to injure and defraud said association, issue and put forth the aforesaid Certificate of Deposit, without any authority therefor from the said directors, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further find and present: That the said W. G. Simpson, late of the City of Caldwell, in

the district aforesaid, then and there being the identical person to whom said Certificate of Deposit was, in the manner and form aforesaid, issued and put forth, heretofore, to-wit, on the day and year last aforesaid at said Caldwell, in Canyon County, State and District of Idaho, and within the jurisdiction of this court, did then and there wilfully, unlawfully and feloniously, and with intent to injure and defraud the said association, aid, abet, incite, counsel and procure the said S. D. Simpson, cashier of said association as aforesaid, wilfully, unlawfully and feloniously, and with intent to injure and defraud the said association as aforesaid, and without authority of the said board of directors as aforesaid, to issue and put forth the said Certificate of Deposit in manner and form aforesaid to do and commit, he, the said W. G. Simpson, then and there well knowing that he did not have the said sum of Two Thousand Five Hundred Dollars (\$2,500.00), or any sum at all on deposit with the said association;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

J. R. SMEAD,

Assistant United States Attorney, District of Idaho.

Guy E. Matthews, Foreman of the Grand Jury of the United States.

Witnesses Examined before the Grand Jury in the Above Case:

Fred G. Huffman; M. J. Devers, Director; F. W.

Ford, Bookkeeper; F. A. Walters, Director; Fred Brown.

Indorsed: Filed February 13, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy Clerk.

PLEA OF ONCE IN JEOPARDY.

*In the District Court of the United States Within
and for the District of Idaho, Southern Division.*

UNITED STATES,

Plaintiff,

vs.

W. G. SIMPSON and S. D. SIMPSON,

Defendants.

No. 563.

To the Honorable Judge of said Court:

Come Now the defendants in the above styled and numbered cause and file this their written plea of jeopardy and acquittal, and under oath state the facts to be:

That at a former term of this Honorable Court, held in the said District and Division of the said State, which said court then and there had jurisdiction, these defendants were required to and did enter a plea of not guilty to an indictment similarly styled and bearing the identical number that this indictment bears, and thereupon in said court came a jury composed of and eleven others and after having been duly tested and empaneled, oral testimony was taken and submitted

under the rulings of the court in said cause to the said jury from the 16th day of September, A. D. 1914, to the 18th day of September, A. D. 1914. That on the said last date, the Government having introduced all of its testimony, rested, and thereupon the defendants and each of them, rested, and thereupon the Government closed its case, and then the defendants, and each of them closed their cases, and thereupon came the United States by its representatives and argued the said cause to the court and to the jury and thereupon came the defendants by their representatives and argued the said cause to the court and to the jury, and thereupon the court, of its own motion and over the protest of these defendants, and each of them, to which action of the court the defendants and each of them excepted and still except discharged the said jury without the permission or consent or agreement of these defendants, or either of them.

Wherefore, these defendants and each of them, show that they have been in jeopardy and legally acquitted by reason of the facts hereinbefore detailed of all of which facts these defendants now offer proof and testimony. That such indictment upon which the foregoing happenings occurred is attached hereto and made a part hereof and shows as aforesaid the identical number carried by the indictment now called for hearing; and the defendants here and now offer testimony to show that it was upon said indictment that an issue was formed between them and the United States and the testi-

mony was taken as aforesaid, in open court and before a jury regularly empaneled for the number of days aforesaid, and that thereafter the said jury, over these defendants' protest was discharged as hereinbefore stated and shown.

Wherefore, DEFENDANTS PRAY THAT THEY MAY GO HENCE WITHOUT DAY.

J. H. HAWLEY,

W. A. STONE,

Attorneys for defendant, W. G. Simpson.

C. H. LINGENFELTER,

W. H. ATWELL,

Attorneys for defendant, S. D. Simpson.

W. G. Simpson, Defendant,

S. D. Simpson, Defendant.

Subscribed and sworn to before me this 23rd day of February, A. D. 1915, by W. G. Simpson and S. D. Simpson.

CHAS. W. MACK,

Notary Public.

*In the District Court of the United States Within
and for the District of Idaho, Southern Division.*

February Term, 1914.

THE UNITED STATES OF AMERICA,

vs.

S. D. SIMPSON and W. G. SIMPSON,

Defendants.

INDICTMENT.

CHARGE: Issuing Certificate of Deposit without authority, Vio. Sec. 5209, R. S. U. S.

The Grand Jurors of the United States of America, being first duly empaneled and sworn, within and for the District of Idaho, in the name and by the authority of the United States of America, upon their oaths, do find and present:

That heretofore, to-wit, on or about the 27th day of March, 1913, at Caldwell in the County of Canyon and State of Idaho, and within the jurisdiction of this court, one S. D. Simpson being then and there the Cashier of a certain national banking association, then and there known and designated as "The American National Bank of Caldwell", which said association had been theretofore created and organized under and by vitrue of an act of Congress entitled "An Act to Provide a National Currency secured by a Pledge of United States Bonds, and to Provide for the Circulation and Redemption thereof", approved June 3, 1864, and which said association was then and there acting and carrying on a banking business at the City of Caldwell in the said district under the said act of congress and acts amendatory thereto, and which said association was then and there authorized to lawfully issue and put forth certificates of deposit drawn upon said association, did wilfully, unlawfully and feloniously, and with the intent to injure and defraud said association, issue and put forth a certain certificate of deposit drawn upon said association in the sum of

\$2,500.00 therein and thereby certifying that there had been deposited by one W. G. Simpson in and with said association, the said sum of \$2,500.00, which said certificate of deposit was then and there in words and figures following, to-wit:

"The Monticello Banking Co.,
Monticello, Ky., 9715

THE AMERICAN NATIONAL BANK 1549
OF CALDWELL.

No. 1991—Int.	\$2,500.00
	62.50
	<hr/>
	\$2,562.50

Caldwell, Idaho, March 27, 1913.

CERTIFICATE OF DEPOSIT.

Not Subject to Check.

W. G. Simpson has deposited in this bank Twenty-five Hundred & No-100 Dollars payable to the order of himself in current funds on the return of this Certificate properly endorsed six months after date, with interest at 5 per cent per annum. No interest after maturity.

S. D. SIMPSON, Cashier.

Due Sept. 27th."

In the center of the face of said certificate of deposit appears a circle with a capital C in pad or purple ink, and which said certificate of Deposit after having been so issued and put forth as afore-said has been on the back endorsed as follows:

"W. G. Simpson. All prior endorsements guaranteed. Pay to the order of any bank or banker

Sep. 22, 1913. The Monticello Banking Co., 73-258 Monticello, Ky. W. L. Baker, Cashier. 9-22—9715.

92-50. Previous endorsements guaranteed. Pay any bank or banker or order. Sep. 27, 1913. First National Bank, Caldwell, Idaho. W. P. Lyon, Cashier.

Pay to the order of First Nat. Bank, all prior endorsements guaranteed. First National Bank of Chicago 2-1 Sep. 24, 1913. 2—H. A. Howland, Cashier.

All prior endorsements guaranteed pay to the order of any bank or banker, Sep. 23, 1913. Please report by our No. 3204, National Bank of Kentucky, Louisville, Ky. H. D. Ormsby, Cashier."

And the Grand Jurors aforesaid, on their oaths aforesaid, do further find and present, that the said W. G. Simpson, to whom said Certificate of Deposit was then and there issued and put forth as aforesaid, did not then and there, to-wit, at the time the said certificate of deposit was so issued and put forth by the said S. D. Simpson, cashier as aforesaid, have on deposit with said National Banking Association, an amount of money then and there equal to the amount then and there specified in said certificate of deposit, to-wit, the amount of \$2,500.00, nor any amount or sum of money whatsoever as he, the said S. D. Simpson, then and there well knew, and so the said S. D. Simpson did, at the time aforesaid and in the manner and form aforesaid, wilfully, unlawfully and

feloniously, and with the intent to injure and defraud said association, issue and put forth the aforesaid certificate of deposit, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further find and present: That the said W. G. Simpson, late of the City of Caldwell, in the district aforesaid, then and there being the identical person to whom said certificate of deposit was in the manner and form aforesaid, issued and put forth heretofore, to-wit, on the day and year last aforesaid at said Caldwell and within the jurisdiction of this court, did then and there wilfully, unlawfully and feloniously, and with the intent aforesaid to injure and defraud the said association, aid, abet, incite, counsel and procure the said S. D. Simpson, cashier of said association so as aforesaid, to wilfully, unlawfully and feloniously, and with the intent aforesaid, issued and put forth the said certificate of deposit in manner and form aforesaid to do and commit, he, the said W. G. Simpson, then and there well knowing that he did not have the said sum of \$2,500.00 or any sum at all on deposit with the said association;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

HARRY KEYSER,

United States Attorney for the District of Idaho.

C. J. Sinsel, Foreman of the Grand Jury of the United States.

Witnesses Examined before the Grand Jury in the Above Case:

E. M. Henden, Fred Brown, Roy Brollier, M. J. Devers.

Indorsed: Filed February 13, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy Clerk.

REPLICATION TO PLEA OF JEOPARDY.

In the District Court of the United States Within and for the District of Idaho, Southern Division.

THE UNITED STATES OF AMERICA,

vs.

W. G. SIMPSON and S. D. SIMPSON,

Defendants.

No. 563.

Replication to Plea of Jeopardy.

Comes now J. L. McClear, attorney for the United States in and for the Southern Division, District of Idaho, and appears for the said United States in its behalf and says that the United States ought not to be precluded from prosecuting the said indictment against the said W. G. and S. D. Simpson by reason of anything pleaded in the plea of former jeopardy of said defendants in this cause for the reason that said plea is not a true statement of the proceedings on the 18th day of September, 1914, as is shown by a copy of the journal record of the court of said day

in this cause, which is attached hereto and marked Exhibit "A" and made a part hereof. That further that the question of the insufficiency of the indictment in the former hearing of this case was raised by one of the attorneys for the defendant, as shown by such journal record and further shows that the indictment was quashed and the jury discharged and that the defendants or neither of them were ever tried, convicted or acquitted on a sufficient indictment as shown by the records of this court, and further that the plea as filed by defendants does not raise an issue of fact in this cause.

J. L. McCLEAR,
United States Attorney.

EXHIBIT "A". Sept. 18, 1914

No. 563.

THE UNITED STATES OF AMERICA,

vs.

S. D. SIMPSON and W. G. SIMPSON,

Issuing Certificate of Deposit Without Authority.

The trial of this cause adjourned on yesterday for further hearing and was this day resumed. Jury called and found to be present and the respective counsel being in court. C. H. Lingenfelter, Esq., addressed the court and jury on behalf of the defendant, S. G. Simpson, followed by Wm. A. Stone, Esq., on behalf of the defendant, W. G. Simpson. Here the defendant, by Wm. A. Atwell, Esq., moved

the court for a peremptory instruction to the jury to return a verdict of not guilty, which motion was opposed by counsel for plaintiff and after argument the court ordered that said motion be denied, to which ruling the defendants by their counsel excepted in due form of law, which exception was allowed. The court thereupon ordered that the indictment in this cause be quashed and discharged the jury from the further consideration of said cause, and upon motion of the United States District Attorney it was ordered that cause be re-submitted to another Grand Jury and ordered that the defendants be each admitted to bail in the sum of \$2500.00.

Indorsed: Filed February 24, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy Clerk.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

UNITED STATES,

Plaintiff,

vs.

W. G. SIMPSON and S. D. SIMPSON,

Defendants.

No. 563.

Demurrer.

To the Honorable Frank S. Dietrich, Judge thereof:

I.

Come Now the defendants and show to the court that the indictment in the above styled and num-

bered case states no offense known to the laws of the United States of America. Wherefore, they pray judgment.

II.

Further demurring and moving to quash the above styled and numbered indictment, the defendants and each of them plead that the same is duplicitous in that it charges four separate and distinct offenses; (1) it charges these defendants with having issued and put forth a certificate of deposit with intent to injure the National Banking Association therein mentioned, and (2) it attempts to charge these defendants with having issued the certificate of deposit herein mentioned with intent to defraud the National Banking Association therein mentioned; (3) it attempts to charge these defendants with having issued the certificate of deposit therein mentioned, and (4) it further attempts to charge these defendants with having put forth the certificate of deposit therein mentioned. Thus it attempts to charge the doing of an act with intent to injure; the doing of an act with intent to defraud; the issuing of a certificate of deposit and the putting forth of a certificate of deposit, each of which acts is, if properly pleaded, a distinct offense under Section 5209.

III.

The said indictment is further defective and subject to demurrer and motion to quash, both of which suggestions and motions are here now made, because the same attempts to plead and does plead a

state of facts which do not constitute a violation of that portion of Section 5209 which makes it criminal to issue a certificate of deposit under the conditions therein inhibited; such facts being the pleading of what appears to be testimony which if true does not constitute a violation of Section 5209. In other words, the statute does not denounce as criminal the issuance of a certificate of deposit without the funds first being deposited in said bank, but merely contents itself with denouncing as criminal the issuance of a certificate of deposit without the authority of the board of directors, and such allegations are therefore impertinent and do not allege facts constituting an offense.

Further for other demurrers and objections to said bill of indictment and reasons for quashing the same and holding the same for naught, these defendants show that the said bill is uncertain, vague and indefinite and does not sufficiently apprise them of the charge sought to be made against them, in that in one portion thereof it is alleged and averred that a certificate of deposit was issued and put forth wherein it was certified that there had been deposited by one W. G. Simpson in and with said Association the sum of \$2500.00, and in another portion thereof it is alleged and averred that at the time said certificate of deposit was so issued and put forth the said W. G. Simpson did not have on deposit with the said National Banking Association the said sum of \$2500.00, or any amount or sum whatsoever, and there is no statement or allegation or averment that

the said W. G. Simpson had not in fact deposited \$2500.00 in said bank to the credit of said bank, or paid over to said bank the said sum of money. In other words the allegations made in the bill of indictment might be thoroughly consistent with the legal issuing of said certificate of deposit and the allegations and averments in said indictment in said regard are not inconsistent with the innocence of the defendants and each and both of them.

Said indictment is further vague, inconsistent and does not give these defendants sufficiently to understand the charge made against them, in that it is alleged in said bill of indictment that said National Banking Association and its board of directors were authorized to issue and put forth certificates of deposit drawn upon said Association, and then proceeds to set forth an alleged state of facts which would show the drawing of the certificate therein described by the said Association.

Wherefore defendants pray that they go hence without day.

J. H. HAWLEY,

W. A. STONE,

Attorneys for Defendant, W. G. Simpson.

C. H. LINGENFELTER,

W. H. ATWELL,

Attorneys for Defendant, S. D. Simpson.

Indorsed: Filed February 23, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy Clerk.

INSTRUCTION REQUESTED ON BEHALF OF
DEFENDANT, W. G. SIMPSON. No. 1.

It appears from the testimony in this case that for a long time prior, and for several weeks subsequent, to the date on which the crime charged in the indictment is alleged to have been committed, to-wit: the 27th day of March, 1913, the defendant, W. G. Simpson, was President of the American National Bank of Caldwell, Idaho;

The indictment alleges that the defendant, W. G. Simpson, aided and abetted by one, S. D. Simpson, who, as cashier of the said American National Bank, is charged in the indictment as principal.

Under the provisions of Section 5209, Revised Statutes of the United States, one who is an officer of a National Bank can not be charged and tried as an aider or abetter, but such officer must be indicted and tried as a principal.

You are, therefore, instructed to find the defendant, W. G. Simpson not guilty.

Richardson vs. United States, 181, Fed.
Rep. 1.

Coffin vs. United States, 162 (162) U. S.
S. C. 664, Law Ed. Vol. 40, 1109.

Contra: U. S. vs. Kettenbach, 202 Fed.
377.

DEFENDANTS' INSTRUCTION No. 14.

The jury are instructed that to warrant a conviction, each fact necessary to establish the guilt of the accused must be proven by competent evidence

beyond a reasonable doubt, and the facts and circumstances proven should not only be consistent with the guilt of the accused, but inconsistent with any other reasonable hypothesis or conclusion than that of guilt to produce in your minds a reasonable and moral certainty that the accused committed the offense.

DEFENDANTS' INSTRUCTION No. 15.

The court further instructs the jury that circumstances of suspicion, no matter how grave or strong, are not proof of guilt, and the accused must be found not guilty unless the fact of his guilt is proven beyond every reasonable doubt to the actual exclusion of every reasonable hypothesis of his innocence consistent with the facts proven.

DEFENDANTS' INSTRUCTION No. 16.

The jury are instructed that a defendant must be presumed to be innocent until his guilt is fully established by legal evidence. The presumption of innocence prevails throughout the trial and it is the duty of the jury, if possible, to reconcile the evidence with this presumption.

DEFENDANTS' INSTRUCTION No. 17.

The jury are instructed that each circumstance, essential to the conclusion of the defendant's guilt should be fully established in the same manner and to the same extent as if the whole issue rested upon it. You must be satisfied that each link in the chain of circumstances, essential to the conclusion sought to be established by the prosecution has been fully

proven beyond a reasonable doubt and to your entire satisfaction, otherwise you must acquit.

DEFENDANTS' INSTRUCTION No. 18.

The jury are instructed that in order to convict the defendants upon circumstantial evidence, it is necessary not only that all the circumstances concur to show that he committed the crime charged, but that they are inconsistent with any other reasonable conclusion. It is not sufficient that the circumstances proven coincide with, account for, and render probable the hypothesis sought to be established by the prosecution, but they must exclude, to a moral certainty, every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty.

DEFENDANTS' INSTRUCTION No. 19.

I further instruct you, gentlemen of the jury, that the mere suspicion of guilt engendered by the evidence is not sufficient to warrant the conviction of the defendant upon a criminal charge. The guilt of the defendant so charged must be proven beyond reasonable doubt by the evidence in the case. The further fact that the defendants in this case rested upon the close of the case for the prosecution and did not introduce evidence in their own behalf, is not a circumstance to be considered by the jury as indicating guilt. It is the right of the defendants so to do and such course should not prejudice them or either of them in the minds of the jury or be a circumstance to be considered against them or either of them, if in the minds of the jury the proof offered

by the prosecution does not prove the guilt of the defendants upon the particular charge made in the indictment beyond all reasonable doubt.

Endorsed: Filed Feb. 26, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

DEFENDANTS' SPECIALLY REQUESTED
CHARGE No. 12.

*In the United States District Court for the District
of Idaho at Boise.*

UNITED STATES,

vs.

W. G. and S. D. SIMPSON.

Defendants' Specially Requested Charge No. 12.

The defendants request the court to charge the jury as follows:

You are instructed, gentlemen of the jury, that the defendants are on trial under an indictment for an alleged offense under what is known as Section 5209 of the Revised Statutes of the United States; and since the indictment does not charge the issuing of the certificate of deposit therein mentioned, without the authority of the Board of Directors of the American National Bank at Caldwell, you will find the defendants not guilty.

*In the United States District Court for the District
of Idaho at Boise.*

UNITED STATES,

vs.

W. G. SIMPSON and S. D. SIMPSON,

Defendants' Specially Requested Charge No. 2.

You are instructed, gentlemen of the jury, that before you can convict the defendants upon the charge made against them in this indictment, that you must find from the evidence, beyond a reasonable doubt that the certificate of deposit mentioned in the indictment must have been issued or put in circulation by the defendants, or either of them, without the authority of the Board of Directors, and if you find that there is no testimony showing such want of authority you will find the defendants, both of them, not guilty.

*In the United States District Court for the District
of Idaho at Boise.*

UNITED STATES,

vs.

W. G. SIMPSON and S. D. SIMPSON.

Defendants' Specially Requested Charge No. 3.

You are instructed, gentlemen of the jury, to find the defendants not guilty of the charge made against them in the indictment.

*In the United States District Court for the District
of Idaho at Boise.*

UNITED STATES,

vs.

W. G. and S. D. SIMPSON.

Defendants' Specially Requested Charge No. 4.

You are instructed, gentlemen of the jury, that since the Government has offered no proof showing or tending to show the want of authority from the Board of Directors of the American National Bank of Caldwell for the issuing of the certificate of deposit set forth in the bill of indictment and introduced in evidence, you will find the defendants, and both of them not guilty.

*In the United States District Court for the District
of Idaho at Boise.*

UNITED STATES,

vs.

W. G. and S. D. SIMPSON.

Defendants' Specially Requested Charge No. 5.

You are instructed, gentlemen of the jury, that the indictment in this case alleged no offense against the laws of the United States because same fails to allege that the certificate of deposit set forth in the bill of indictment was issued without the authority of the Board of Directors, or any of them, of the American National Bank at Caldwell, and you will therefore find defendants not guilty.

*In the United States District Court for the District
of Idaho at Boise.*

UNITED STATES,

vs.

W. G. and S. D. SIMPSON.

Defendants' Specially Requested Charge No. 6.

You are instructed, gentlemen of the jury, that certificates of deposit may be lawfully issued by National Banks and particularly by the American National Bank of Caldwell, if the Board of Directors authorize such issuance, and if they do authorize such issuance, such act or issuance of such certificate of deposit would not be illegal nor amount to any offense against Section 5209 of the United States Revised Statutes; and therefore there being no testimony introduced before you showing or tending to show that the Board of Directors of the American National Bank of Caldwell did not authorize the issuance of the certificate of deposit set forth in the bill of indictment, if the same in fact were issued, that you shall and are hereby instructed to find the defendants, and both of them, not guilty.

*In the United States District Court for the District
of Idaho at Boise.*

UNITED STATES,

vs.

W. G. and S. D. SIMPSON.

Defendants' Specially Requested Charge No. 7.

You are hereby instructed, gentlemen of the jury, to find defendants not guilty, for the reason that the

Government has failed to introduce any proof that the certificate of deposit set forth in the bill of indictment, was issued, of the same were issued, without the consent of the Board of Directors of the American National Bank of Caldwell.

*In the United States District Court for the District
of Idaho at Boise.*

UNITED STATES,

vs.

W. G. and S. D. SIMPSON.

Defendants' Specially Requested Charge No. 8.

You are instructed, gentlemen of the jury, to find defendants not guilty of the charge made against him in the indictment for the reason that the said indictment fails to allege that the certificate of deposit therein mentioned was issued without the authority of the Board of Directors of the American National Bank of Caldwell.

*In the United States District Court for the District
of Idaho at Boise.*

UNITED STATES,

vs.

W. G. and S. D. SIMPSON.

Defendants' Specially Requested Charge No. 9.

You are instructed, gentlemen of the jury, that the testimony with reference to the change of the

numbers on the certificate of deposit was not unlawful and you cannot convict the defendant S. D. Simpson, nor either of the defendants for having changed the said certificate, if you find that the defendant S. D. Simpson, or either of the defendants did so change the same, because such change is not an offense under the law and they are not charged in the bill of indictment with any such transaction.

*In the United States District Court for the District
of Idaho at Boise.*

UNITED STATES,

vs.

W. G. and S. D. SIMPSON.

Defendants' Specially Requested Charge No. 10.

You are instructed, gentlemen of the jury, that you cannot convict the defendants, or either of them, because you should find, if you do find, that the certificate of deposit set forth in the bill of indictment and introduced in evidence was issued, if you do find that it was issued, without entering same in the books of the bank, because such a transaction, if it happened is not against the law and is not denounced by the statute; and before you can convict the defendants or either of them, you must find affirmatively from the testimony introduced in evidence, that there was not deposited in the American National Bank at Caldwell, the amount of money or finds or credits indicated on the face of the certifi-

cate and you would not be authorized to convict them in that event, if you should further fail to find that the Directors had not authorized the issuance of such certificate.

*In the United States District Court for the District
of Idaho at Boise.*

UNITED STATES,

vs.

W. G. and S. D. SIMPSON.

Defendants' Specially Requested Charge No. 11.

You are instructed, gentlemen of the jury, that you cannot convict the defendants, S. D. Simpson or W. G. Simpson, until and unless you are satisfied beyond a reasonable doubt, that the offense charged in the indictment has been proven against him, and if you have such doubt, either from the testimony or from the lack of it, it will be your duty to acquit the defendant.

*In the United States District Court for the District
of Idaho at Boise.*

UNITED STATES,

vs.

W. G. and S. D. SIMPSON.

Defendants' Specially Requested Charge No. 12.

You are instructed, gentlemen of the jury, that the defendants are presumed to be innocent of the

charge made against them, and this presumption stands as a sufficient safeguard until you are satisfied from the testimony that they are not guilty of the offense charged against them in the indictment beyond a reasonable doubt, and if you have such doubt, you should acquit them.

Endorsed: Filed April 26, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the United States District Court for the District
of Idaho at Boise.*

UNITED STATES,

vs.

W. G. and S. D. SIMPSON.

Defendants' Specially Requested Charge No. 13.

You are instructed, gentlemen of the jury, that the defendants, and each of them are assumed under the law to be of good character, and this assumption stands as affirmative proof in their behalf and may be taken as testimony to remove any suspicions of wrong-doing that are not proven to be true to your minds beyond a reasonable doubt; and if this is not done, and if your minds are not satisfied beyond a reasonable doubt of the guilt of the defendant S. D. Simpson, giving him the benefit of the presumption of good character and the benefit of the presumption of innocence, it will be your duty to acquit him.

Endorsed: Filed February 26, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

CASE NO. 563.

*Defendant S. D. Simpson's Special Requested Charge
Charge No. 14.*

You are instructed, gentlemen of the jury, that the words "issue" and "put forth", as used in the indictment in this case, and as used in the statute, have a special legal meaning, which is, in substance, that the instrument declared upon in this prosecution must have been complete at the time it went into the hands of the holder. In other words, it must have been dated, signed, must have carried an amount, a payee, and a maturity. In other words, a blank certificate could not have been issued and put forth within the meaning of the indictment, and within the meaning of the statute.

(Refused).

CASE NO. 563.

*Defendant S. D. Simpson's Special Requested Charge
No. 15.*

You are directed, gentlemen of the jury, to find the defendants not guilty, for the reason that the indictment herein is duplicitous, in that it charges four different and distinct offenses, to-wit, it declares upon an act which is said to have been done with intent to injure the bank, and also declares upon that same act as having been done with intent to defraud, and it also declares that the instrument declared upon in the indictment was issued, and it also provides that the instrument declared on in the indict-

ment was put forth. Now you are told that issuing and putting forth are not synonymous terms in the law; neither are injure and defraud synonymous terms. They are used in the statute disjunctively, but declared upon in the indictment conjunctively, and because of such declaration the indictment is duplicitous, and you will find for the defendants.

(Refused).

CASE NO. 563.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

THE UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

*Defendant S. D. Simpson's Specially Requested
Charge No. 1.*

You are instructed, gentlemen of the jury, that the pith of the charge in the indictment in this case is the issuing and putting forth of the certificate of deposit therein described without the consent of the board of directors of the Bank and with the intent to injure and defraud that Bank, and the allegation is made in the indictment that such issuing and putting forth was within the Idaho District and within the Southern Division of such District. This allegation is a matter of fact that must be proven by the Government to your satisfaction beyond a reasonable doubt, and you are therefore charged that if you should find, in accordance with the other instruc-

tions herein given you, that the certificate of deposit described in the indictment was not issued and put forth in the Southern Division of the District of Idaho, but was issued and put forth in the State of Mississippi, or anywhere else than the Southern Division of the District of Idaho, and, to-wit, in Canyon County, or if you have a reasonable doubt upon this question, you will find the defendants and both of them not guilty.

(Given in part).

CASE NO. 563.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

THE UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

*Defendant S. D. Simpson's Specially Requested
Charge No. 2.*

The charge made against these defendants is that they issued in Canyon County, Southern Division of the District of Idaho, a certain certificate of deposit without the consent of the board of directors. It is in evidence before you that the cashier, S. D. Simpson, one of the defendants herein, was in the habit of issuing certificates of deposit without first consulting the directors of the institution and that the directors knew this. It is further in evidence that when the certificate was received in Caldwell for pay-

ment on September 27, 1913, the board of directors of the Bank met and ratified its issuance and ordered it paid, and you are therefore instructed that such ratification, as a matter of law, dated back to the time of its issuance and rendered valid its issuance and you are therefore directed to acquit both defendants.

(Refused).

CASE NO. 563.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

THE UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

*Defendant S. D. Simpson's Specially Requested
Charge No. 3.*

You are charged as a matter of law, gentlemen, that the certificate in question was not issued or put forth, in the legal sense of those two terms, in Canyon County, Southern Division of the District of Idaho. If you find, as a matter of fact, that the certificate was not dated nor made payable to any one, nor for any amount, but was in fact blank, save and except that S. D. Simpson had signed the same when it left Canyon County, State of Idaho, it would be your duty, therefore, to find the defendants, and each of them, not guilty.

(Refused).

CASE NO. 563.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

THE UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

*Defendant S. D. Simpson's Specially Requested
Charge No. 4.*

You are instructed, gentlemen of the jury, that if you find, as a matter of fact, that the certificate set forth in the indictment as actually filled out as to date and amount and maturity and payee, and had all of its blanks filled in the State of Mississippi, or if you have a reasonable doubt upon this question, then and in that event, it would be your duty to find the defendants and each of them not guilty, because in such event the certificate would not have been issued and put forth in the Southern Division of the District of Idaho, as charged in the bill of indictment.

CASE NO. 563.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

THE UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

*Defendant S. D. Simpson's Specially Requested
Charge No. 5.*

You are instructed, gentlemen of the jury, that the only charge against these defendants, or either of them, is the issuing of the certificate of deposit set forth in the indictment without the consent of the board of directors and with intent to injure and defraud the bank and in coming to your conclusion as to whether or not the Government has established its allegations with respect to this question, beyond a reasonable doubt, you shall not consider the depositing of the \$2425.00 to the account of W. G. Simpson, nor the subsequent transactions with relation thereto, for the reason that the intent to injure and defraud as alleged in the indictment and demanded by the law to constitute the acts an offense, is the intent that existed in the minds of the defendants at the time of the issuing and not an intent or determination they formed thereafter and if you believe or have a reasonable doubt as to whether they had the intent to injure and defraud at the time the certificate was issued and put forth, then it would be your duty to acquit the defendants and both of them.

CASE NO. 563.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

THE UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

*Defendant S. D. Simpson's Specially Requested
Charge No. 6.*

You will find the defendant, S. D. Simpson, not guilty.

(Refused).

CASE NO. 563.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

THE UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

*Defendant S. D. Simpson's Specially Requested
Charge No. 7.*

You are instructed, gentlemen of the jury, that the intent to injure and defraud is an essential ingredient of the offense charged and before you can convict the defendant, S. D. Simpson, you must believe beyond a reasonable doubt, not only that the certificate in question was issued and put forth without the consent of the directors in Canyon County on the date alleged in the indictment, but also that at that time, the defendant, S. D. Simpson, intended thereby to injure and defraud the American National Bank, and if you do not so find beyond a reasonable doubt, it will be your duty to acquit the defendant, S. D. Simpson.

CASE NO. 563.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

THE UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

*Defendant S. D. Simpson's Specially Requested
Charge No. 8.*

You are instructed, gentlemen of the jury, that it is no ingredient or part of the offense charged against these defendants that they shall have followed, or failed to have followed, the instructions or commands of the National Bank Examiner, and you shall not permit the testimony that has been introduced before you with reference to such orders or commands to influence you in finding a verdict against the defendants, or either of them, unless you shall in addition thereto find independently that each of them had an intent to injure and defraud the American National Bank at the time of the issuing and putting forth if they did issue and put forth, the certificate in question within the jurisdiction of this Court, and without the consent of the board of directors of that Bank.

CASE NO. 563.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

THE UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

*Defendant S. D. Simpson's Specially Requested
Charge No. 9.*

You are instructed, gentlemen of the jury, that the Government was permitted to prove the payment of the certificate in question when the same was presented at the American National Bank in September, 1913, and there was some testimony by one or two of the Government witnesses that that amount was lost to the Bank. In view of this testimony, the court permitted the defendant to prove and to testify that the fund out of which the Bank made the payment in September, 1913, was raised by the defendant and paid by the defendant and that as a matter of fact, it was not lost to the Bank, and you are therefore charged, that you may take all of this testimony, both of the Government and the defendant for the purpose of assisting you in securing such light as you may upon the original intention of the defendants to injure and defraud, as hereinbefore and as hereinafter mentioned and charged.

CASE NO. 563.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

THE UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

*Defendant S. D. Simpson's Specially Requested
Charge No. 10.*

You are charged, gentlemen of the jury, that the statute does not require and it is not an ingredient of the offense charged against these defendants, that the money should be deposited in a bank when a certificate of deposit is issued, nor does the statute require that money or its equivalent be deposited in a bank or with a bank before that bank shall issue a certificate of deposit, nor does the law require that one shall deposit money or its equivalent before a bank shall issue to him a certificate of deposit.

CASE NO. 563.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

THE UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

*Defendant S. D. Simpson's Specially Requested
Charge No. 11.*

You are further instructed, gentlemen of the jury, that the statute under which this indictment is found and under which these defendants are being prosecuted, does not require or demand that the consent of the board of directors of a bank shall be secured concurrent with the issuance of a certificate of deposit.

(Refused).

CASE NO. 563.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

THE UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

*Defendant S. D. Simpson's Specially Requested
Charge No. 12.*

You are charged, gentlemen of the jury, that the law under which these defendants are being prosecuted does not state when the consent of the board of directors shall be secured with reference to the issuance of a certificate of deposit, whether such consent shall be prior to its issuance or after its issuance, nor does it prescribe any particular time for such consent either before or after such issuance and, therefore, if you find that the board of directors, of the American National Bank, or have a reasonable doubt with reference thereto, accepted such certificate on September 27, 1913, acknowledged it as the debt of the Bank and ratified its original issuing and putting forth and ordered the same paid, with full knowledge of all the facts with relation thereto, then and in that event, such consent and ratification would date back to the time of the certificate's original issuance and constitute a consent to such original issuing.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

THE UNITED STATES,

Plaintiff,

vs.

S. D. SIMPSON and W. G. SIMPSON,

Defendants.

*Instructions asked to Be Given by Defendant, W. G.
Simpson.*

Hawley & Hawley, and

W. A. Stone,

Attorneys for Defendant,

W. G. Simpson.

Defendants' Instruction No. 1.

I further instruct you, gentlemen of the jury, that the mere issuance of the certificate of deposit in question is not sufficient to constitute the crime with which the defendants are charged. Before the defendants, or either of them, can be convicted the jury must be convinced by the evidence, beyond all reasonable doubt that in issuing said certificate, the defendants intended to injure or defraud the American National Bank.

(Refused).

Defendants' Instruction No. 2a.

You are instructed that the evidence is insufficient to justify the conviction herein of the defendant W. G. Simpson, and I advise you therefore to acquit him.

(Refused).

Defendants' Instruction No. 2a.

The jury is instructed that a certificate of deposit is not issued within the meaning of the statute under consideration until the same has been filled out and delivered to or for the party in whose benefit the same is drawn, and in this case, if you find that the certificate of deposit in question was delivered in blank by the defendant, S. D. Simpson to the defendant W. G. Simpson, at Caldwell, Idaho, and was by W. G. Simpson filled out in the State of Kentucky with the name of payee and the amount called for by the certificate, then and in such event, the crime, if such action was a crime, was committed not in the State or District of Idaho, but in another and different and in another judicial district of the United States then this court would not have jurisdiction of the offense charged, and you should, therefore, acquit the defendants and each of them.

(Refused).

Defendants' Instruction No. 3.

I further instruct you, gentlemen of the jury, that if the certificate of deposit in question was issued at Caldwell on or about the time charged in the information, and that at the time of its issuance the defendants fully intended that said certificate of deposit should be disposed of for the benefit of the bank, and the proceeds of its sale should be placed in the funds of the Bank, and that the defendants

were acting in good faith in said matter at the time of such issuance, but that afterwards, the defendants, or either of them, misappropriated such proceeds to another and a different purpose and to the detriment of the Bank, or appropriated said proceeds to their or his own use and benefit, then and in such event, the defendants or either of them so acting was guilty of a crime under the laws of the United States, by reason of such taking or misapplication of said funds, but such crime is not included in the charge contained in this indictment and you cannot convict the defendants, or such defendant, under this indictment therefor, and your verdict should be not guilty on the present charge.

Defendants' Instruction No. 5.

The court further instructs you, gentlemen of the jury, that if the jury believes from the evidence that at the time of issuing the certificate of deposit mentioned in the indictment, the defendants issued the same without any intent on their part to defraud or injure the Bank, but intended to use the said certificate as a means of obtaining money to meet the necessities of the Bank and turn over the proceeds thereof to the Bank, but afterwards the defendants, or either of them, changed their o r his mind and decided to appropriate the proceeds arising from the disposition of said certificate to their or his own use, in such event, the defendants cannot be convicted under this indictment.

Defendants' Instruction No. 6.

The jury are instructed that where an act done is made a crime if committed with a fraudulent intent on the part of the person charged with the commission of such crime, that the question of the intention of the accused becomes an important one for the consideration of the jury. Intent being but a mental state of the accused, direct proof of it is not required, nor can it ordinarily be shown by direct proof, but it is generally established by all the facts and circumstances attending the doing of the act complained of, as disclosed in the evidence, and in this case the intent with which the defendants, or either of them, issued the certificate of deposit in question must be determined by you from all of the evidence in the case. You must be satisfied from all of the evidence in the case that the intent to defraud the American National Bank existed in the mind of each defendant before you can convict such defendant.

(Given in substance).

Defendants' Instruction No. 7.

I further instruct you, gentlemen of the jury, that if it is shown by the evidence that defendant, W. G. Simpson, after he discovered the disposition made of the check and the proceeds of the check for \$2425.00 sent by him to the American National Bank, made arrangements to take up said check and pay it off and made proper arrangements therefor, under all the circumstances surrounding the matter, as it

would appear to him as a reasonable man, such matter as to be considered by you in connection with the other circumstances of the case in considering the question as to whether or not in the original making and taking by him of said certificate of deposit he was actuated by any intent to defraud or injure the American National Bank.

Defendants' Instruction No. 8.

I further instruct you, gentlemen of the jury, that while the defendants in this cause are jointly charged, that there is no charge made, either in the indictment or in the evidence that there was a conspiracy between the two defendants to injure or defraud the Bank by the issuance of the certificate of deposit in question without the authority of the board of directors of said Bank being first obtained. You are privileged to find both of the defendants innocent, or both of the defendants guilty of the offense charged, or you can find one of the defendants guilty and the other not guilty. You are not privileged in this case to consider an act or a statement done or made by one of the defendants as the act or statement of the other defendant, unless it is further shown by the evidence that said other defendant had knowledge of or connection with, or was a party to said act or statement or authorized it.

(Given in substance).

Endorsed: Filed Feb. 26, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

S. D. SIMPSON and W. G. SIMPSON,
Defendants.

VERDICT.

We the jury in the above entitled cause find the defendant, S. D. Simpson, guilty as charged in the indictment and we find the defendant, W. G. Simpson, guilty as charged in the indictment, but earnestly recommend both to the leniency of the court.

J. J. BENNETT, Foreman.

Endorsed: Filed February 27, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger Deputy.

At a stated term of the District Court of the United States for the District of Idaho, held at Boise, Idaho, on Tuesday the 23rd day of February, 1915.

Present: Hon. Frank S. Dietrich, Judge.

NO. 563.

THE UNITED STATES

vs.

S. D. SIMPSON and W. G. SIMPSON.

*Issuing Certificate of Deposit With Intent to Injure
and Defraud.*

On this day the defendants herein came into court in person and by their attorneys C. H. Lingenfelter

and William H. Atwell, Esqs., appearing as counsel on behalf of the defendant S. D. Simpson, and James H. Hawley and William A. Stone, Esqs., on behalf of the defendant W. G. Simpson, to be arraigned upon the true bill of indictment heretofore presented against them by the Grand Jury. In answer to the court each defendant stated that he was indicted under his true name; the formal reading of the indictment was waived and each defendant furnished with a true copy thereof by order of Court. The defendants here stated that they were ready to plead, and thereupon filed a demurrer, which after consideration by the court was overruled. Thereupon they were permitted to file and did file their plea of once in jeopardy and former acquittal, and being asked for their plea each defendant pleaded, separately for himself, that he is not guilty of the offense charged in the indictment.

It appearing to the court that there is not a sufficient number of trial jurors in attendance with the express assent of the defendants, S. D. Simpson and W. G. Simpson, it was ordered that a venire be issued to the Marshal to summon fifteen good and lawful men to appear in said cause at three o'clock P. M. to serve as trial jurors which venire was duly issued and returned by the Marshal with the names of the following persons served, to-wit: J. I. Mills, J. R. Rose, R. R. Mason, Dean Perkins, W. L. Basil, S. D. Vance, C. W. Balentine, W. W. Abrams, D. L. Selby, F. J. Gove, T. A. Sloan, Arthur W. Gibbs, J. R. Bennetts, Chas. E. Bullock and W. H. Thompson.

Thereupon said cause came regularly on to be heard and tried before the court and jury, counsel appearing for the defendants as above stated. J. L. McClear, U. S. District Attorney, and John R. Smead, Assistant U. S. District Attorney, appearing on behalf of the plaintiff, and said defendants each being in court in person. The Deputy Clerk under the directions of the court proceeded to draw from the jury box the names of twelve persons, one at a time, to serve as a jury in said cause.

William Loving a person drawn from the box and sworn on voir dire was excused for cause.

The following named persons drawn from the box and sworn were excused on peremptory challenge by counsel for plaintiff, to-wit: A. P. Carnahan, Thomas Loveland, O. L. Bumgardner, Burt Leisey and J. R. Bennetts.

The following named persons drawn from the box and sworn were excused on peremptory challenge by counsel for defendants, to-wit: K. L. Keyes, Conrad M. Sutton, John Frees, Edward Goodrich, Alexander Duncan, Charles L. Points, Guy Graham and W. W. Abrams; and the following are the names of the persons drawn from the box, sworn on voir dire, passed upon, accepted by counsel for the respective parties and sworn by the Deputy Clerk to well and truly try said cause and a true verdict render therein according to the law and evidence, to-wit: Joseph Caylor, B. M. Buncell, Marion Philpot, R. H. Knowlton, J. J. Bennett, H. W. Balentine, D. L. Sel-

by W. L. Basil, H. W. Stevenson, Edward Swanton, F. J. Gove and Arthur W. Gibbs.

Under the directions of the court the indictment was read to the jury by the Assistant U. S. District Attorney and the defendants' pleas stated, after which the court admonished said jury, and adjourned the further hearing of said cause until tomorrow the 24th inst. at ten o'clock A. M.

Wednesday, February 24, 1915.

NO. 563.

THE UNITED STATES

vs.

S. D. SIMPSON and W. G. SIMPSON.

*Issuing Certificate of Deposit With Intent to Injure
and Defraud.*

The trial of this cause adjourned on yesterday for further hearing was this day resumed. Jury called and found to be present; the respective attorneys of record and the defendants in person each being in court. Here the plea of once in jeopardy and former acquittal came on for hearing, and after hearing the evidence and argument and upon consideration, the court instructed the jury to return a verdict in favor of the United States and against the defendants, which was done accordingly, and said verdict is in the words following, to-wit:

"In the District Court of the United States of America, District of Idaho, Southern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. G. SIMPSON and S. D. SIMPSON,

Defendants.

VERDICT.

We the jury in the above entitled cause find in favor of the United States of America, and against the defendants upon the plea of once in jeopardy and former acquittal interposed by the defendants.

J. J. BENNETT, Foreman."

Which verdict was filed and read to the jury, who confirmed the same. Thereupon said defendants by their respective attorneys excepted in due form of law, which exception was by the Court allowed. Thereupon the trial proceeded upon the pleas of not guilty.

The following named persons were sworn, examined and cross-examined as witnesses on behalf of plaintiff, to-wit: Fred Brown, M. L. Walker, A. W. Porter, James H. Forbes and C. D. Gates, after which the court admonished the said jury and adjourned the further hearing of said cause until tomorrow the 25th inst. at ten o'clock A. M.

Thursday, February 25, 1915.

No. 563.

THE UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

Issuing Certificates of Deposit Without Authority.

The trial of this cause adjourned on yesterday for further hearing was this day resumed. Jury called and found to be present; the respective attorneys of record and the defendants in person each being in court.

The following named persons were sworn, examined and cross-examined as witnesses on behalf of plaintiff, to-wit: W. L. Baker, Frank W. Ford, E. M. Hendon, Lou Ella Kaley, Fred Brown, recalled, Fred G. Hoffman and the plaintiff rests.

S. D. Simpson (defendant) was sworn, examined and cross-examined as a witness on behalf of defendants and during the cross-examination the court admonished the jury, and adjourned the further hearing of said cause until tomorrow the 26th inst. at ten o'clock A. M.

Friday, February 26, 1915.

No. 563.

THE UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

Issuing Certificates of Deposit Without Authority.

The trial of this cause adjourned on yesterday for further hearing was this day resumed. Jury called and found to be present; the respective attorneys of record and the defendants in person being in court.

The following named persons were sworn, examined and cross-exahined as witnesses on behalf of

defendant, to-wit: W. G. Simpson (defendant) and S. D. Simpson (defendant) recalled and the defense rests. Fred Brown, M. J. Devers and M. L. Walker were examined in rebuttal and the evidence closed, and after argument by the respective counsel said jury was instructed by the Court and thereupon retired to their room to consider of their verdict in charge of an officer of the court, who was first duly sworn.

Now came the jury all called and found to be present; the respective attorneys of record and the defendants in person each being in court. Being asked if they had agreed upon a verdict, they through their foreman, stated that they had not and wished further instructions upon the case. And after being further instructed by the Court said jury again retired to their room to consider of their verdict in charge of an officer of the court, who was first duly sworn.

Saturday, February 27, 1915.

No. 563.

THE UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

Issuing Certificates of Deposit Without Authority.

Now came the jury all called and found to be present; the respective attorneys of record and the defendants in person each being in court. Being asked if they had agreed upon a verdict, they

through their foreman stated that they had and presented the following verdict, to-wit:

“In the District Court of the United States for the District of Idaho, Southern Division.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

S. D. SIMPSON and W. G. SIMPSON,

Defendants.

VERDICT.

We, the jury in the above entitled cause, find the defendant, S. D. Simpson, guilty as charged in the indictment, and we find the defendant, W. G. Simpson, guilty as charged in the indictment, but earnestly recommend both to the leniency of the Court.

J. J. BENNETT, Foreman.”

Which verdict was filed and read to the jury, who confirmed the same. Thereupon the Court discharged said jury from the further consideration of said cause.

No. 563.

THE UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON,

Issuing Certificates of Deposit Without Authority.

On this day this cause came on to be heard upon defendants' motion in arrest of judgment and motion for new trial, and after argument by the respective counsel, and after consideration, the Court

ordered that said motions be, and they are hereby overruled.

Saturday, March 6, 1915.

No. 563.

THE UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

Issuing Certificates of Deposit Without Authority.

Now came the U. S. District Attorney with the defendants in person, and by their attorneys, thereupon the Court ordered that the said defendants do each be imprisoned and kept in the United States Penitentiary at McNeil Island, State of Washington, for the term of five (5) years.

In the District Court of the United States for the Southern Division of the District of Idaho.

February Term, A. D. 1915.

Present: Hon. Frank S. Dietrich, Judge.

No. 563.

THE UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

Convicted of Issuing Certificates of Deposit Without Authority.

Now, On this 6th day of March, 1915, the United States District Attorney, with the defendants in person and by their counsel, W. A. Stone, James H. Hawley, C. H. Lingenfelter and W. A. Atwell came

into court; the defendants were duly informed by the Court of the nature of the indictment found against them for the crime of issuing certificates of deposit without authority, committed on the 27th day of March, A. D. 1913, of his arraignment and plea of "Not guilty as charged in said indictment," of their trial and the verdict of the jury on the 27th day of March, A. D. 1913, "Guilty as charged in the indictment." The defendants were then asked by the Court if they had any legal cause to show why judgment should not be pronounced against them, to which they replied that they had none, and no sufficient cause being shown or appearing to the Court.

Now, therefore, the said defendants each having been convicted of the crime of issuing certificates of deposit without authority, it is hereby considered and adjudged that the said defendants, S. D. Simpson and W. G. Simpson, ^{each} ~~and that they stand committed until said fine is paid.~~

~~And that he~~ be imprisoned and kept in the U. S. Penitentiary at McNiel Island, State of Washington, for the term of five (5) years and it is further ordered and adjudged that said defendants be and are hereby remanded to the custody of the United States Marshal for Idaho, to be by him delivered into said prison and to the proper officer or officers thereof.

MOTION FOR NEW TRIAL.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

Case No. 563.

UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

To the Honorable F. S. Dietrich, Judge thereof:

Come Now, the defendants and move the Court to set aside the verdict herein rendered on Saturday, February 27th, A. D. 1915, and grant them a new trial for the following reasons, to-wit:

Because the verdict is contrary to the evidence:

(a) In that the evidence showed beyond controversy that the certificate set forth in the bill of indictment did not become such a certificate until some time in April, 1913, at Meridian, Mississippi, where the same first came into existence and from which point the same was forwarded for a commercial transaction to the first holder thereof in Monticello, Kentucky, or put forth within the jurisdiction of this Court.

(b) The continuous practice of the defendant, S. D. Simpson, to issue certificates of deposit without the express consent of the Board of Directors, was sufficient to authorize the said defendant to assume that his course in sending forth the blank certificate in question to see if the same could in fact be issued and put forth elsewhere would be ratified by the Board of Directors and assented to by such Board.

(c) When the certificate was handed to the defendant, W. G. Simpson, in the Idaho District, by the defendant, S. D. Simpson, the same was a mere blank piece of paper without any payee, amount, date or maturity therein and there was no testimony that either of the defendants knew at that time what would be the amount thereof, nor the maturity, nor the date, nor who would be the payee, but the same was, in fact, turned over in its incomplete and blank condition for the purpose of seeing whether the same could be issued and put forth in another jurisdiction.

(d) The use of the \$2425.00 after the date of the turning over of the unfilled blank certificate in Idaho and after it was issued and put forth and completed in the State of Mississippi, could not constitute the statutory offense charged, nor tend to establish the same in the absence of the belief beyond a reasonable doubt that such intent to injure and defraud existed in Idaho when the certificate was handed out or in Mississippi when the certificate was issued and put forth, and other than the mistaken use of such fund after the offense was complete, if it was an offense, or after the innocent act had happened, if it was an innocent act. There was no injury or defrauding of the Bank from which such intent to injure or defraud might legitimately and lawfully have been presumed by the jury.

II.

Because the same is contrary to the law in that:

(a) The law does not permit one to be convicted

in the jurisdiction of Idaho for an offense committed in the State of Mississippi, or in the State of Kentucky.

(b) The law does not permit an intent to injure and to defraud to be presumed from any act other than an act that in fact does injure or does defraud and the instruction of the Court delivered at 1 A. M. on the morning of Saturday, February 27th, to the jury in response to their request for further light upon the question of intent, that if they found as an affirmative fact, that the defendants used the \$2425 as their own, knowing that it was the property of the Bank, that from such circumstance they would be authorized in presuming that they intended to injure and defraud at the time of the issuing and putting forth of the certificate of deposit.

(c) The Court erred in his resume of his original charge on intent, which resume was given to the jury at 1 A. M. Saturday, February 27th, in response to their request for additional light upon the question of intent, when and wherein he failed to instruct the jury as to the defendants' rights under the question of intent; that is to say, if the jury were in doubt as to the intent and were halting in their judgment, that these questions of intent must be found against the defendants beyond a reasonable doubt, and if there was such doubt, as was then and there being evidenced, in the minds of the jurors, they should resolve it in favor of the defendants and acquit them.

Wherefore, defendants pray as heretofore stated.

W. A. STONE, and

JAMES H. HAWLEY,

Attorneys for Defendant, W. G. Simpson.

C. H. LINGENFELTER,

and W. H. ATWELL,

Attorneys for Defendant, S. D. Simpson.

Endorsed: Filed March 1, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy Clerk.

BILL OF EXCEPTIONS.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

No. 563.

UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

Be it remembered that upon trial of the above numbered and entitled cause, in the District Court of the United States for the Southern Division of the District of Idaho, at Boise, from the 23rd to the 27th days of February, inclusive, A. D. 1915, the following proceedings were had, to-wit:

Upon the call of the cause, the defendants presented their motion to quash and demurrers, the grounds of which are more particularly set forth in such motion and demurrers and the Court, after having heard the same, overruled the same in all respects, whereupon the defendants, and each of

them duly and seasonably, in open court, excepted and still except.

And be it further remembered that thereafter the defendants called to the attention of the Court and presented to the Court their written plea of jeopardy and former acquittal, which said plea in words and figures, had theretofore been filed with the Clerk of the Court and which said plea is here and now referred to.

And be it further remembered in this connection that the jury for the trial of this cause had been duly selected and empaneled and was sitting in the jury box, and thereupon, upon replication being filed by the Government the Court ordered that the defendants proceed with such plea, though there had been no demurrer filed thereto by the Government, and thereupon the defendants introduced the following testimony, and the following happened, to-wit:

The Court: Have you any proof to offer in support of your plea, gentlemen?

Mr. Atwell: Yes, sir.

The Court: Proceed.

Mr. Atwell: We first offer, may it please your Honor, indictment No. 563, United States against W. G. and S. D. Simpson.

The Court: The indictment in this court, you mean?

Mr. Atwell: Yes, sir. Copy is attached to the plea, and the original is now offered in testimony,

which is the identical indictment now sought to be tried in this court, save and except that the sentence relating to the issuing of certificate without the authority of the Board of Directors is added. It is alleged in the plea that that indictment came on to be heard before a court of competent jurisdiction, of which Your Honor takes judicial notice. We offer the journal entries showing the calling of the case for trial on the 16th day of September, 1914, of such numbered and styled indictment; the pleading of the defendants to the bill of indictment; the empaneling of a jury composed of D. M. McGlenn and eleven others; the calling of witnesses by the government, and the swearing of such witnesses, and the testifying of such witnesses in that cause. We offer the journal entries of this honorable court for September 16, 17, 18, and particularly such journal entries as show that the Government rested its case on September 17th, and that thereupon the defendants rested their case, that thereupon the Government closed its case, that thereupon the United States Attorney and his Assistant and counsel for the defendants argued the cause which had theretofore been tried and submitted in this honorable court on those dates. And also such journal entries as particularly show that on the last of such dates, to-wit: September 18th, the defendants asked the Court to instruct the jury to bring in a verdict of not guilty, but that the Court, of his own motion, discharging the jury, over the protest and exception of the defendants. The Court of course, takes judicial knowledge of the indictment that we are now called upon to answer. The read-

ing of these various documents, may it please Your Honor, is waived, I assume.

Mr. McClear: I was going to say, Your Honor, that we take issue with them on that proof, and wish to stand on the journal record of the last day, but dispute the statement as to the fact that the case was entirely submitted to the court. The other attorneys, Mr. Lingenfelter and Mr. Hawley, had made an argument, and Mr. Atwell, in the course of his argument—

The Court: They are just introducing the record relating to these matters.

Mr. Hawley: The entire record.

Mr. McClear: We are standing on the entire record.

The Court: Then it will be understood that the entire record in that case is before the Court.

* * * *

The Court: Argument is unnecessary. Gentlemen of the jury, in order that you may understand what has been presented here, and not be confused or misled, I will say to you that, as appears from the record to which reference has now been made, these defendants were brought into court at a former term hereof, upon a charge substantially in the main like that set forth in the present indictment. After the evidence had been offered, my attention was called to the fact, by a motion for a directed verdict on the part of the defendants, that that indictment was defective, and after argument I felt impelled to take

that view, that is, that that indictment did not state facts sufficient to charge an offense under the statute, and I thereupon discharged the jury from the further consideration of that cause, and directed that the matter be re-submitted to the Grand Jury. Following that direction, the District Attorney did re-present the matter to the Grand Jury, resulting in this indictment which you are now called upon to try. I advise you that as a matter of law the evidence is insufficient to support this defense which is now being interposed, that is, that these defendants have been once in jeopardy. There is a principle of law that a man shall not be tried twice for the same offense, but in view of what took place in the former case that is not deemed to have been a trial. Hence they have never been tried for this offense, and therefore, you will return a verdict, so far as this particular issue is concerned, that is, this plea of once in jeopardy, in favor of the Government and against the defendants, and thereupon we will proceed to try the question as to whether or not they are guilty or not as charged in the indictment. Of course, you will try that issue, that is, whether or not these defendants, or either of them are guilty of the offense now before you, you will try that issue without being prejudiced in any way by reason of the interposition of this plea of former jeopardy. You will give them a fair trial upon the question whether or not they are guilty of the offense charged in the indictment which was read to you last night, and which is not on trial.

Gentlemen, I will prepare this form of verdict and let the jury bring it in later, if you are willing that that course be pursued, in order to avoid delay.

Mr. Hawley: That will be satisfactory. We note an exception, of course.

The Court: Yes, you may take your exception now, and when the verdict is returned, you may also have your exception.

Mr. Atwell: We would like also, Your Honor, to reserve an exception to that portion of the Court's charge which called the attention of the jury to the fact that the matter had been re-submitted to a Grand Jury upon instructions of the court.

The Court: The jury, of course, will not be prejudiced by that fact. You will understand that it is necessary in this court, in order to bring anyone to trial, to first submit the matter to a grand jury, and have an indictment. Now the indictment here is no evidence at all of the guilt of either one of the defendants; it raises no presumption; it is not a circumstance to be considered by you touching their guilt; it is simply a formal charge by which the Government advises the defendants of the charge upon which they are to be tried, so that they can prepare their defense, so that the fact that the matter was re-submitted to a grand jury shall not be taken by you as prejudicial to them in any way.

The Court: I have a form of verdict prepared now, gentlemen. Before the introduction of evidence, gentlemen of the jury, referring again to the

matter of the plea which I explained to you a moment ago, and upon which I stated it would be your duty to find in favor of the Government and against the defendants, I have a form of verdict prepared in accordance with that view. You may elect a foreman in your seat, and he will sign this verdict. You may right there just elect a foreman and have him sign this verdict.

(J. J. Bennett was thereupon elected, and signed the verdict, which read as follows: "We, the jury in the above entitled cause find in favor of the United States of America, and against the defendants upon the plea of once in jeopardy and former acquittal interposed by the defendants.")

The Court: This verdict may be filed. The record of course will show that it is returned under the direction of this court.

Mr. Lingenfelter: And over the objection of the defendants.

The Court: Yes. You have your exception.

And be it further remembered that after the introduction of the said testimony, the court of his own motion instructed the jury to find against the defendants' said plea and presented to the said jury a form of verdict which they were to and did sign, such verdict being as follows: "We, the jury, find against the defendants' plea of former jeopardy and acquittal. (Signed), Foreman." To which action of the court, the defendants then and there, in open court, duly and seasonably excepted and still except.

And be it further remembered that at the conclusion of the testimony upon the plea of not guilty the court charged the jury in the following language and form, to-wit:

The Court: Gentlemen of the jury, the charge in this case upon which the defendants are being tried involves a violation of what is commonly known as the National Banking Laws of the United States. Those laws provide for the organization of what are called Banking Associations, and for the operation of these associations under the law and under the supervision of the Comptroller of the Treasury Department. The Comptroller supervises this class of banks all over the United States, and in order that he may know the facts, know how the bank is being administered, how its affairs are being conducted, from time to time, he calls for a report, a written report, from the bank officials themselves, and in addition to that the Comptroller has in the field constantly a large number of examiners, whose duty it is to go here and there, and from time to time, under the direction of the Comptroller, to examine the books and records and assets and paper of the bank, and report their findings to the Comptroller, all with the view of keeping the Government officials advised touching the condition of the bank's affairs, and its solvency or insolvency, its compliance with, or its violation of, the provisions of the banking laws and rules of the Department. While one of these examiners has no authority to make rules, he has the right to demand that the law

and such rules as are adopted and promulgated by the Department within the law be complied with. He has a right to go into a bank and ask for information, and he has a right to receive full and truthful answers. I say this much upon this point because of a suggestion which has been made in regard to the rights and duties of the examiner who examined the bank in this case.

The defendants here are not charged with making false reports to the Comptroller or making untruthful answers to the examiner, or concealing any fact from the examiner. If, however, you find that they did conceal any fact, material to this present inquiry, from the examiner, you may consider that as a circumstance bearing upon the general question as to whether or not they are guilty of the offense charged here, and which I will explain to you more in detail later on.

The defendants in this case, as in all criminal prosecutions, whether in the state courts or in the federal courts in this country, come into court and stand before the jury presumed to be innocent of the charge upon which they are being tried; that is, there is a presumption that they are not guilty, and therefore the burden is cast, not upon them to show their innocence, but upon the Government to establish their guilt. This burden rests upon the Government in this case. It was its duty to show the defendant's guilt, and to do this, not merely by a preponderance of the evidence, but by evidence which convinces your judgment beyond a reasonable

doubt. I think you all answered that you are familiar with this doctrine in our criminal jurisprudence that no one shall be found guilty of a criminal offense unless the jury is convinced beyond a reasonable doubt of such guilt. and that means that you must be convinced beyond a reasonable doubt of the truthfulness of each material charge or element of the charge set forth in the indictment. By reasonable doubt is meant what the term itself upon its face implies, a reasonable doubt, not a mere fanciful doubt, but a doubt which is raised by the evidence upon some material point, or which results because of the insufficiency of the evidence upon some material point which the government must establish. Generally speaking, I may say to you that if, after you have made a candid comparison of all the evidence, and fairly considered it, you can truthfully say to yourselves that you have an abiding conviction of the defendants' guilt, such a conviction as you would be willing to act upon in the most important affairs of your own lives, then you have no reasonable doubt, and you should convict. If, upon the other hand, after such fair and candid analysis and consideration of the evidence, you cannot truthfully say that you have an abiding conviction, then you have a reasonable doubt, and you should acquit.

Each defendant here stands in his own right and on his own responsibility. That means that you cannot convict one of the defendants because of the wrong-doing, if you find any wrong-doing, on the part of the other. While they are jointly charged,

and are being jointly tried, each one, as I have suggested, is responsible for his own acts alone, and only that which he himself has done or said, or that in which he has participated, or that which he has authorized or caused to be done. No one is responsible for the acts or conduct of another unless he has in some way made himself responsible by acquiescing in or participating in or authorizing such act or thing. Hence in your consideration of the evidence, what one of the defendants did alone or what he said or wrote, these facts, are to be considered against such defendant alone, unless the other participated in what was said or done or written, or had knowledge of and acquiesced therein. You will see that it is entirely possible, depending upon what you believe the evidence shows, for you to find both of the defendants guilty as charged, or both of them not guilty, or one of them guilty and the other not guilty.

The statute upon which the indictment is based is in substance as follows: "Every president, director, cashier, teller, clerk, or agent of any national bank, who, without authority of the directors of the bank, issues or puts forth any certificate of deposit, with intent to injure or defraud that bank, or other corporation or person," is guilty of an offense, and is punishable. And furthermore, "Every person who, with like intent, aids or abets such cashier or other officer of the bank in so doing," is also guilty of an offense.

The defendant, S. D. Simpson, here is charged with having violated the first part of the statute, as I have read it to you, that is, that, as cashier, it is charged, he, without authority of the directors, issued or put forth a certificate of deposit, which is set forth in the indictment, with intent to injure and defraud the bank. And W. G. Simpson is charged with having aided and abetted him in so doing, with intent to injure and defraud the bank.

Speaking first now of S. D. Simpson, the defendant cashier: The elements of the offense charged against him are, first, that the bank at Caldwell of which he was cashier was a national banking association. Second, that he, S. D. Simpson, was at the time the cashier thereof. Third, that S. D. Simpson issued or put forth the certificate in question, and that he did so within the state of Idaho. Fourth, that the issuance of the certificate was without authority from the board of directors. Fifth, that it was issued with intent to injure or defraud the bank or its depositors of stockholders. It is necessary for you to find in the affirmative upon all of those five issues in order to find him guilty. And as to W. G. Simpson, in addition to that, it is necessary to find that he aided or abetted S. D. Simpson in so acting, and with intent on the part of him, W. G. Simpson, also to injure or defraud the bank.

Now a brief explanation of these elements, and speaking first with regard to the ingredients or elements of the offense as charged against the cashier, S. D. Simpson: You will doubtless have little diffi-

culty in understanding the proposition as to the American National Bank at Caldwell being a national banking association, and that S. D. Simpson was the cashier thereof. Coming now to the third proposition, namely, the meaning of the phrase or terms "issuing" or "putting forth" a certificate. As to this I have to say: If you find—and you will give careful attention to this—if you find that the defendant, S. D. Simpson, as cashier of the bank, and within the state of Idaho, signed the certificate in question in the customary way of signing such certificates, and put it into the hands of his brother, W. G. Simpson, either filled out in its present form, or with the date, amount, and payee in blank, as the defendants contend, with the authority to W. G. Simpson to fill in the blanks left for such purposes, and if thereupon, pursuant to such authority, the defendant, W. G. Simpson, took such certificate and filled in such blanks, and negotiated it by selling it or hypothecating it as collateral security, then you should find that said certificate was issued and put forth by the cashier, S. D. Simpson, one of the defendants at the time and place he signed the same and delivered it into the possession of his co-defendant. That is to say, gentlemen, it is quite unimportant whether this certificate was issued in blank or not, if in blank, and if S. D. Simpson, delivered it to his brother with authority to fill in the blanks, and to negotiate it, in contemplation of law that is the same as if it had been delivered to W. G. Simpson fully filled in, with authority to negotiate it.

As to the next element of the crime, and that is, that the certificate was issued without the authority of the directors, I explain the meaning of the statute to you in this way: The statute provides that to constitute an offense the certificate must be issued without authority of the directors. of the bank. There is, as I understand, no contention here that the Board of Directors gave express consent, that is, by order or resolution or by-law, express consent to the issuance of this certificate, but it is argued upon behalf of the defendants that their assent, that is, the assent of the Board of Directors, is to be inferred or implied from the fact that the cashier had been accustomed to issue certificates of deposit, and had issued them in large numbers, with the knowledge of the Board of Directors, and without objection upon their part. I say such is the argument or contention of the defendants. Generally I may say to you that in the absence of a by-law or of prohibitive action on the part of the Board of Directors, a cashier, by virtue of his official position, has authority to issue a certificate of deposit for moneys actually deposited in the bank. You will understand that in law a certificate of deposit is nothing more than a certificate to the effect that the holder thereof, or the payee therein named, has deposited in the bank the amount of money called for by the instrument, which amount of money, upon demand, or at a time stated in the certificate, the bank agrees to repay to the depositor or his assigns. It would be an ordinary incident of the banking business, therefore, for a cashier to issue

to a depositor who makes an actual deposit a certificate evidencing that fact. But no such general or implied authority from the board of directors exists in the cashier to issue a certificate of deposit falsely stating that the person to whom it is issued has deposited or has on deposit the amount therein stated. In other words, there is no general authority in a cashier to issue a certificate of deposit except in cases where the bank has received the money or its equivalent, and the fact that the board of directors may know it to be the practice of the cashier to issue certificates of deposit covering moneys actually received, and acquiesce therein, does not imply an assent upon their part to the issuance of a certificate when no money or other thing of value is received. And so in this case, the fact that the board of directors may have known of and acquiesced in the practice of issuing certificates where deposits were actually made, would constitute no warrant to the defendant cashier to issue the certificate in question without receiving for the bank and to its credit an equivalent in value.

Passing now to the next ingredient or element of the offense, and that is the intent to injure or defraud. Much of the evidence, both that offered by the Government and that offered by the defendants, bears upon this question of the intent. The offense defined by the statute is not complete unless there was at the time an intent to injure or defraud the bank or some other person. Proof of intent is rarely direct; direct proof of one's intent is, as a rule, im-

possible, because it is impossible to see into a man's mind and thus observe its operations. Intent as a rule is to be inferred from all of the facts and circumstances surrounding the transaction, the conduct, the acts, the words, of the person charged, and the circumstances surrounding them. Generally speaking, concealment and secrecy on the one hand is regarded as evidence of a certain intent, while openness of conduct is regarded as a circumstance tending to show a different intent.

While upon the witness stand the defendants were both called upon to testify touching their intent; that is, they were permitted to testify, and did testify, that they had no wrong intent. You are not to be bound by that necessarily. You may consider their statements in that respect together with all of the other facts and circumstances in evidence, and from all of the evidence, including their statements, determine what their intent actually was. As a rule, as was said to you in the course of the argument, a man is presumed to intend the natural consequences of that which he does. It is always subject to explanation, but in the absence of some explanation the presumption arises that a rational man intends the natural and probable consequences of that which he does. The term intent as here used does not imply malevolence, that is, malice, or ill will, toward the bank or anyone else; no hostility or bad feeling is involved. Intent to injure or defraud the bank is simply a willingness on the part of the defendants, the persons charged, to do an act which is violative of a right of

the bank and its depositors or stockholders. The mere fact that the wrongdoer may have expected ultimately to make reparation for a wrong which he wilfully does is not material and does not deprive the fact of the wrongful intent. For illustration, one who, as an employe of a bank, wrongfully appropriates its moneys coming into his possession, and embezzles the same, may in good faith intend ultimately to return the money, but such intention is of no avail. If he wilfully takes the money which doesn't belong to him he commits the crime of embezzlement, even though he may expect ultimately to reimburse the bank. Nor would any return of the money after the same has once been embezzled relieve the embezzler from the charge of embezzlement. So in considering the offense here involved: if you find that the defendants intended the issuance of one of the bank's certificates of deposit, and the use of it, either by sale or hypothecation, for the purpose of raising funds for their own private uses, and not for the bank, then you may conclude that they intended to injure and defraud the bank, even though it may have been their expectation and purpose to take care of the certificate and pay it when it became due, out of their own funds. In this connection reference may be made to the testimony tending to show that some time in the fall, possibly in September, I think that is right, is it not, gentlemen, September, when this certificate of deposit came to Caldwell?

Mr. McClear: September 27th.

The Court: September, when the certificate of deposit was sent to another bank at Caldwell for collection, and was presented for payment, some arrangement was made by which the defendants, or one of them, took care of it and protected the bank against loss. Such is the testimony on behalf of one or both of the defendants. And you will bear in mind that the charge here is not that the American National Bank was injured or defrauded, but that the certificate was issued with the intention to injure or defraud. And the defendants are not to be relieved or acquitted merely because they took care that the bank did not ultimately suffer loss. The question is not whether the bank was actually defrauded or not. The question is whether the certificate was issued with that intention. Evidence of this fact of payment would not have been received but for one consideration, and that is the contention of the defendants that the money which was realized by using the certificate as collateral in Kentucky got into the private accounts of the defendants as the result of a misunderstanding between them, and that the mistake was not discovered until W. G. Simpson came to Idaho about the middle of August. If, to illustrate my meaning, the defendants had immediately repaired the wrong, before others had knowledge of the existence of the certificate, you might very properly conclude that the restoration to the bank of the value of the certificate at that time tended to corroborate their intention of innocent mistake.

Whether you will give such significance to the restoration at the later date, when the certificate had

come to Caldwell and its existence was known, or must have become known, and under all the circumstances of the case, I leave it to you to say. Except for such light, if any, as you may conclude it, that is, the payment, throws upon this question, that is, the question whether the certificate was intended to be used for the personal benefit of the defendants, or whether such benefit was the result of inadvertence and misunderstanding, the restoration or payment is without significance.

I have further to advise you that if the certificate was issued by the defendant, S. D. Simpson, at or about the time mentioned in the information, and by said defendant delivered to the defendant, W. G. Simpson, in good faith, and without any intent on his part to defraud the bank in question, and that the defendant, W. G. Simpson disposed of said certificate of deposit with the intent of applying the proceeds of the disposition of said certificate to the use of the said bank, and sent the proceeds thereof in good faith to his co-defendant, S. D. Simpson, with the expectation and instruction that the said defendant, S. D. Simpson would deposit said proceeds in said bank for the use and benefit of the bank, you could not find the defendant W. G. Simpson guilty. Nor, in such case, if S. D. Simpson innocently believed that the money he received was the personal funds of his brother, should he be found guilty. Nor, if the certificate was issued in good faith, for the purpose of getting funds for the bank and was hypothecated as collateral for that purpose, and if

the funds so realized were in good faith sent to the bank for its use and benefit, would the defendants or either of them be guilty of the offense here charged, if thereafter, that is, after the funds were sent to the bank, in good faith, for its use and benefit, and received by it, the defendants then misapplied them by appropriating them to their own personal use. It is essential to guilt here that a wrongful intent must have existed at and prior to the time the certificate was hypothecated in Kentucky.

Now bearing in mind the explanation I have made to you of the various terms of the statute, I again repeat that you must find upon these questions: First, was the American National Bank at Caldwell a national banking association? Second, was S. D. Simpson the cashier thereof at the time the certificate of deposit was issued? Third, as such cashier, did he issue or put forth this certificate, and did he issue it in Idaho? Fourth, was the issuance without the authority of the board of directors of the bank? Fifth, was it with the intent to injure or defraud the bank or some other person? So much for S. D. Simpson.

As to W. G. Simpson, as I have already stated to you, he is charged with aiding and abetting in this alleged wrongful conduct on the part of his brother, S. D. Simpson. So as to him you must in addition find: First, that he aided or abetted S. D. Simpson, and, Second, that he did so with like intent, that is, with intent to injure or defraud the bank or its depositors or stockholders.

Gentlemen of the jury, you are the sole judges of the issues of fact in this case, and it is also your duty to take from the court, in good faith, and apply to the facts, the principles of law as I have explained them to you, even though you may have some pre-conceived or other idea as to what the law is or should be. I am leaving to you entirely the questions of fact, and it is for you to say upon which side the truth lies. You being the sole judges of the issues of fact, you are likewise the sole judges of the credibility of the witnesses, and the weight to be given to their testimony or any part of it. If I have inadvertently or indirectly seemed to you to express or imply any opinion or view as to what the facts are you are at liberty to disregard such views upon my part, for I am leaving to you entirely this responsibility, expecting, however, that you will apply the law to the facts as I have given it to you. I can help you very little in the performance of your duty touching the credibility of the witnesses. The best I can say to you, I think, is that you should bring to bear those rules which consciously or unconsciously you have learned in practical every-day experience and life. You have seen the witnesses testify, and you have thus the advantage of noting their demeanor upon the witness stand, and in the light of all of the evidence you should determine whether a witness has testified truthfully or falsely, and, if falsely, you may reject the testimony so far as it is false, and furthermore, if you find any witness has wilfully testified falsely, has wilfully misstated the

truth, perjured himself, you may reject all of his testimony, unless in some respects it is corroborated by order proof which is credible to you.

The defendants have chosen to testify upon their own behalf. This they had a right to do. Or they might have remained silent. Having chosen to testify, they occupy the same position as any other witnesses in the case, and they are to be judged in the light of the same general principles which are applicable to the testimony of all witnesses. You can't reject their testimony merely because they are the defendants in the case. You should weigh it carefully and candidly and fairly. You have a right to take into consideration, and it is your duty to take into consideration, the great interest they had in the result of the prosecution, because the interest of any witness in any prosecution is always a matter for consideration in determining the credibility of his testimony and the weight to be given to it. So you are to take into consideration here the interest of these witnesses, their deep interest, as you are to take into consideration any interest which you may find that any witness has in the result of the prosecution. Of course, if you find that the defendants have testified truthfully, then you will give the same force and effect to their truthful testimony that you will give to the testimony of any other witnesses.

It is necessary, gentlemen, that all of you concur in finding a verdict. As I have already explained to you, your verdict may be against both of the defendants or in favor of both of them, or against one

and in favor of the other. A form of verdict has been prepared which I think you will have no difficulty in using. It is as follows: "We the jury in the above entitled cause find the defendant, S. D. Simpson" and there a blank is left for the entry of the word "guilty" or the words "not guilty" as the case may be, to express your finding; and then it proceeds: "as charged in the indictment. And we find the defendant, W. G. Simpson,"—and there a blank is left for the insertion of the word "guilty" or the words "not guilty." When you have agreed upon a verdict, if you do so agree, your foreman will sign it, and you will come into court.

You will understand, gentlemen, that from this time on you are not to speak to anyone or permit anyone to speak to you concerning this case, not even the bailiff, himself, except to ask you if you have agreed upon a verdict.

(Bailiff sworn.)

Gentlemen, you may retire into the hallway with the bailiff for a few minutes. I will send word for you either to return or go to your jury room.

(Jury retired.)

Mr. Atwell: The defendant, S. D. Simpson, merely reserves an exception to the failure to give such of his requested instructions as were not given. Some of them I think were given in part.

The Court: Yes.

Mr. Atwell: And I reserve an exception to the charge upon issuing, may it please the court, the

definition of issuing, and to the question of venue, and to the use of the disjunctive in injure or defraud, it being charged in the indictment that is was injuring and defrauding.

Mr. Hawley: On behalf of the defendant, W. G. Simpson, we repeat and adopt the exceptions made by counsel for the other defendant, and in addition we take our exceptions to the charges tendered in behalf of the defendant, W. G. Simpson, and which have not been given by the court, and also our exceptions to the charges tendered in behalf of the defendant, S. D. Simpson, the same having been adopted as pertaining to the case against W. G. Simpson, at the time the same were presented.

The Court: Yes, that was understood. You may have your exceptions.

And be it further remembered that at the conclusion of the said charge and before the jury retired and in open court, the defendants and each of them, excepted to that portion of said charge which states as follows, to-wit:

“Coming now to the third proposition, namely, the meaning of the phrase or terms ‘issuing’ or ‘putting forth’ a certificate. As to this, I have to say: If you find—and you will give careful attention to this—if you find that the defendant, S. D. Simpson, as cashier of the bank and within the State of Idaho, signed the certificate in question in the customary way of signing such certificates and put it into the hands of his brother, W. G. Simpson, either filled out in its present form, or with the date, amount

and payee in blank, as the defendants contend, with the authority to W. G. Simpson to fill in the blanks left for such purposes, and if thereupon, pursuant to such authority, the defendant, W. G. Simpson took such certificate and filled in such blanks and negotiated it by selling it or hypothecating it as collateral security, then you should find that said certificate was issued and put forth by the cashier, S. D. Simpson, one of the defendants, at the time and place he signed the same and delivered it into the possession of his co-defendant. That is to say, gentlemen, it is quite unimportant whether this certificate was issued in blank or not. If in blank and if S. D. Simpson delivered it to his brother with authority to fill in the blanks and to negotiate it, in contemplation of law that is the same as if it had been delivered to W. G. Simpson fully filled out, with authority to negotiate it."

To which action of the court, as aforesaid, in so instructing the jury as aforesaid, the defendants then and there, duly and seasonably, in open court, before the jury retired, excepted and still except.

And be it further remembered that at the conclusion of the testimony and in his general charge to the jury, the court instructed the jury as follows, to-wit:

"In other words, there is no general authority in a cashier to issue a certificate of deposit, except in cases where the bank has received the money or its equivalent and the fact that the board of directors may know it to be the practice of the cashier to issue

certificates of deposit covering monies actually received, and acquiesced therein, does not imply assent upon their part to the issuance of a certificate when no money or other thing of value is received, and so in this case the fact that the board of directors may have known of and acquiesced in the practice of issuing certificates where deposits were actually made, would constitute no warrant to the defendant cashier to issue the certificate in question without receiving for the bank and to its credit an equivalent in value."

To which instruction, the defendants then and there, in open court, and before the jury retired, duly and seasonably excepted and still excepts.

And be it further remembered that upon the conclusion of the testimony, the court further instructed the jury, and in the following words and sentences, to-wit:

"And you will bear in mind that the charge here is not that the American National Bank was injured or defrauded, but that the certificate was issued with the intention to injure or defraud."

To which charge of the court and such portion thereof, the defendants and each of them, duly and seasonably, in open court and before the jury retired, excepted and still except.

And be it further remembered that at the conclusion of the testimony, the court charged the jury in the following words and sentences, to-wit.

"If, to illustrate my meaning, the defendants had immediately repaired the wrong before others had

knowledge of the existence of the certificate, you might properly conclude that the restoration to the bank of the value of the certificate at that time tended to corroborate their contention of innocent mistake."

To which action of the court and charge and language, the defendants and each of them, then and there, duly and seasonably in open court excepted and still except.

And be it further remembered that at the conclusion of the testimony the court charged the jury in the following sentences and expressions, to-wit:

"Fifth: Was it with the intention to injure or defraud the Bank or some other person? So much for S. D. Simpson. * * * As to W. G. Simpson * * * that he aided or abetted S. D. Simpson and that he did so with like intent, that is, with intent to injure or defraud the bank * * *."

To which action of the court in so charging the jury, the defendants and each of them, duly and seasonably, in open court and before the jury retired, then and there excepted and still except.

And be it further remembered that at the conclusion of the testimony and before the court had delivered his general charge to the jury, the defendants, and each of them, requested in writing that the jury be instructed as shown in charge No. 1.

Be it further remembered that the court failed and refused to give the same or the substance thereof to which action of the court, in so failing and refusing, the defendants, then and there, and each

of them, in open court, duly and seasonably before the jury retired, excepted and still except.

And be it further remembered, that at the conclusion of the testimony and before the court had delivered his charge to the jury, and defendants and each of them requested in writing that the jury be charged as shown in requested charge No. 2, but that the court failed and refused to give the said charge in whole, or in part, or in substance, to which action of the court in so failing and refusing, the defendants and each of them, then and there, duly and seasonably, in open court, before the jury retired, excepted and still except.

And be it further remembered that at the conclusion of the testimony and before the court had charged the jury, the defendants and each of them, requested in writing that the jury be charged as shown in requested charge No. 3, but that the court refused and failed to give the said charge in whole, or in part, or in substance, to which action of the court in so failing and refusing, the defendants and each of them, then and there, duly and seasonably, in open court, before the jury retired, excepted and still except.

And be it further remembered that at the conclusion of the testimony and before the court had delivered his general charge to the jury, the defendants and each of them requested in writing that the jury be charged as shown in requested charge No. 4, but that the court refused to so charge the jury in whole, or in part, or in substance, to which action

of the court the defendants and each of them, then and there, duly and seasonably, in open court, before the jury retired, excepted and still except.

And be it further remembered that at the conclusion of the testimony, and before the court had given his general charge to the jury, the defendants and each of them requested in writing that the jury be charged as shown in requested charge No. 15, but that the court refused to so charge the jury, in whole, or in part, or in substance, and thereupon, in open court and duly and seasonably, before the jury retired, and defendants and each of them excepted and still except to such failure of the court.

And be it further remembered that at the conclusion of the testimony and before the court had given his general charge to the jury, the defendants requested in writing that the jury be charged as shown in requested charge No. 14, but that the court failed and refused to give the said charge in whole, or in part, or in substance, to the jury, to which failure and refusal, the defendants and each of them then and there, duly and seasonably, in open court, excepted and still except.

And be it further remembered that at the conclusion of the testimony and before the court had given his general charge to the jury, the defendants requested in writing that the jury be charged as shown in requested charge No. 6, but that the court failed and refused to give the said charge, to which action of the court, the defendants then and there, in open court, duly and seasonably, and before the jury retired, excepted and still except.

And be it further remembered that at the conclusion of the testimony and before the court had delivered his general charge to the jury, the defendants requested in writing that the jury be charged as shown in requested charge No. 10, but that the court refused and failed to so instruct the jury in whole, or in part, or in substance, and thereupon, the defendants and each of them, duly and seasonably, and in open court, and before the jury retired, excepted and still except.

And be it further remembered that at the conclusion of the testimony and before the court had given his general charge to the jury, the defendants requested in writing that the jury be instructed as shown in requested charge No. 11, but the court refused and failed to give the same in whole, or in part, or in substance, whereupon the defendants and each of them, duly and seasonably, in open court, and before the jury had retired, excepted and still except.

And be it further remembered that at the conclusion of the testimony and before the court had delivered his general charge to the jury, the defendants requested in writing that the jury be charged as shown in requested charge No. 12, but the court refused and failed to give the said instruction in whole, or in part, or in substance, and thereupon the defendants and each of them duly and seasonably, in open court and before the jury retired, excepted and still except.

And be it further remembered that at the conclusion of the testimony and before the jury be

charged as shown in defendants instruction No. 2-A, which instruction the court refused to give in whole or in part, or in substance, to which action of the court, the defendant, W. G. Simpson, then and there, in open court, duly and seasonably and before the jury retired, excepted and still excepts.

And be it further remembered that at the conclusion of the testimony, and before the court had given his general charge to the jury, the defendants requested in writing that the jury be charged as shown in requested instruction No. 4-A, but the court refused to give the same in whole, or in part, or in substance, and thereupon the defendants and each of them, before the jury retired, duly and seasonably, and in open court, excepted and still except.

And be it further remembered that the court finished his instructions to the jury at 9:45 P. M. Friday, February 26th, and thereupon the jury retired in the charge of a bailiff to their room in the Federal Building at Boise, where they were held until 1 A. M. Saturday, February 27th, when they requested that the court send them his charge and thereupon the court had the jury brought into the court room and his charge having been oral and taken down at the time it was given by the court stenographer, who had not yet transcribed the same and who was not at that hour available, the court asked the jury upon what point they desired to hear the charge, and the foreman thereupon arose and said, "We are not satisfied on the question of intent," and thereupon the court, so far as he could remember, resumed his

original charge on the question of intent, save and except he did not restate such restatements were not suggested by anyone to the jury that if they had a reasonable doubt with reference to the intent that they should acquit the defendants and thereupon the jury were retaken to their room and without sleep or succor or accommodations for either, spent the night therein and at 7 o'clock on Saturday morning, February 27th, were taken to breakfast and immediately returned to the jury room, and shortly after 10 o'clock A. M., Saturday, February 27th, they returned into open court a verdict of guilty as to both defendants, but attached to it was this recommendation, to-wit: "We earnestly urge leniency for the defendants." That thereupon and thereafter the defendants and each of them, filed their motion for a new trial, alleging that the verdict was the result of mental and physical exhaustion and was a compromise verdict and was reached, practically, through coercion, which motion the court overruled, to which action the defendants then and there, duly and seasonably excepted and still except.

Be it further remembered that upon the trial of the foregoing cause, there was no direct testimony with reference to the place of issuing or putting forth of the certificate in question save and except that the certificate in question was one of a number of blank certificates that had theretofore been printed for the American National Bank of Caldwell about 1500 of which had theretofore been issued. The defendants testified that about March 20, 1913,

the defendants having heard that three-fourths of the deposit of the City of Caldwell would probably be withdrawn from the American National Bank so that it could be given equally to the other three banks in the town, the two defendants concluded among themselves that the President of the American National Bank, who was defendant, W. G. Simpson, and who was acquainted in Mississippi and Kentucky, with men who were supposed to have have money, and who was going to that section, should take with him some of the blank certificates of deposit upon which defendant S. D. Simpson would sign his name as Cashier, for the purpose of securing upon them funds replace the public deposit that was about to be withdrawn from said Bank; that thereupon five blank certificates without date, amount, maturity or payee written therein, but simply being signed by S. D. Simpson, Cashier, in the manner that such certificates were always signed, were given to the said W. G. Simpson for the said purpose and that he thereupon went to the State of Mississippi, from which point, on April 9th, 1913, he succeeded in making a loan of \$2500 from a Bank at Monticello, Kentucky, upon his own personal note for that amount with a certificate of deposit for \$2500 attached thereto as collateral security, and the defendant W. G. Simpson thereupon in Mississippi, with a typewriter, put the date of March 27th, 1913, in No. 1991 of said certificates and wrote his own name as payee therein and wrote six months as the

maturity thereof and made the amount to be \$2500, and thereupon on said 9th day of April, transmitted the same to the innocent holder at Monticello, Kentucky, who discounted the \$2425, which said amount the said W. G. Simpson transmitted to S. D. Simpson, Cashier of the American National Bank of Caldwell, Idaho, with a letter instructing the said S. D. Simpson to credit the said amount to the certificate of deposit account, advising him that No. 1991 had been negotiated for that amount, due in six months, but the same was deposited by S. D. Simpson to the credit of W. G. Simpson's individual account from which it was checked out by them prior to August 20, 1913, and be it further remembered that defendant S. D. Simpson testified that he remembered there was a letter with the said check but did not remember that it contained any instructions as to the disposition thereof.

And be it further remembered that this being the only testimony showing when or where or at what place the certificate in question was issued, or put forth, the defendants requested in writing that the court should charge the jury as shown in charge No. 1 and charge No. 3 and charge No. 4, duly and seasonably before the court had given his general charge to the jury, but that the court failed and refused to give the said charges or either of them, in whole, or in part, or in substance, but charged the jury that it was quite unimportant whether the certificate was issued in blank or not; if in blank, and if S. D. Simpson delivered it to his brother with

authority to fill in the blanks and to negotiate it, in contemplation of law, that was the same as if it had been delivered to W. G. Simpson fully filled out with authority to negotiate it, to which action of the court in failing to give the said special charges and in giving his general charge as indicated, the defendants and each of them, duly and seasonably, in open court, and before the jury retired, excepted and still except.

And be it further remembered in this connection that the testimony showed the following and no other facts relating to the certificates of deposit of the American National Bank, to-wit: That after the establishment of the American National Bank about the year 1910, two thousand blank certificates of deposit were ordered printed, like the one set out in the bill of indictment, save that the date, payee, amount, maturity and name of signing officer were blank, and numbered from 1 to 2000, inclusive; that such certificates had been used in the regular course of business up to about the number 1900 by March, 1913, at which time, the defendant S. D. Simpson, took from among such blanks, forty or fifty ahead of the number next for use at that time, five blanks and handed them to his brother, upon each of which he had signed his name as cashier in the regular way, and that such blanks were not filled in any other manner. That the bank officers continued to use the blank certificates until some time in August, when one Johnston applied for a certificate of deposit and in the regular serial numbers thereof,

1991, should have been the next for issue, but such number was the first of the five numbers that had been given to W. G. Simpson by S. D. Simpson and was not, therefore, available;

Some time previous, seeing that the blanks were running low, the Bank had ordered another batch printed and by some error according to the testimony of the defendants caused such serial numbers thereon to begin with 2000 instead of 2001, as should have been done, because the old series included the number 2000. From this new printed batch S. D. Simpson according to his testimony, and there was no direct testimony against it, took the blank numbered 2000, erased the 2000 and with a numbering machine placed, or caused to be placed, the number 1991 thereon, and this numbered blank was thereupon filled out and issued to Johnston and tendered in the certificate of deposit register, the other blanks which had theretofore been given to W. G. Simpson having been returned, they were in due course issued and thus the regular sequence of the numbers was maintained. S. D. Simpson said nothing to anybody about the transaction, telling neither directors, nor employees, nor bank examiner, until September 27th, when the certificate that W. G. Simpson had negotiated in Kentucky appeared at the American National Bank for settlement and S. D. Simpson then took it and showed it to the directors and arrangements were made to settle it, and it was settled, and be it further remembered that the Government offered the testimony of a bank examiner to the

effect that if the space in the C. D. register reserved for the entry of certificate No. 1991 has been left blank or had the entry "cancelled" therein, he could have required the production of said certificate or a satisfactory explanation of its whereabouts.

And be it further remembered that upon the submission of the plea of jeopardy and former acquittal, the following facts were proven: That at the September term of the United States District Court for the Southern Division of the District of Idaho, before the Honorable F. S. Dietrich, there was called regularly for trial Indictment No. 563, United States vs. S. D. Simpson and W. G. Simpson, and that thereupon the defendants were arraigned and plead not guilty thereto, an exact copy of which indictment is attached to the defendants' plea of jeopardy in this case, such indictment bearing the same number as does the indictment upon which these defendants were convicted at the February term of said Court, and thereupon a jury was duly impaneled, composed of D. M. McGlenn, and eleven others, and thereupon Government witnesses were sworn and testified and during the days of September 16th, 17th and 18th the said cause was heard and tried in said Court, which court had jurisdiction and that on the 18th day of September, 1914, the Government rested its case and the defendants rested their case, and the Government closed its case and thereupon the defendants closed their case, and counsel for the Government argued the cause to the court and the jury and counsel for the defend-

ants argued their cause to the Court and the jury, and thereupon the last of said counsel, to-wit: William H. Atwell moved the court to direct a verdict for the defendants, which said facts are more particularly shown in the journal of the court for September 18th, 1914, a copy of which is attached to the Government's replication to the defendants' plea of jeopardy herein, and which action was as follows, to-wit: That the said counsel moved the court to preemptorily instruct the jury to return a verdict of not guilty, which action was opposed by counsel for plaintiffs and after argument the court ordered that said motion be denied, to which ruling, the defendants excepted, and the court thereupon ordered that the indictment be quashed and discharged the jury, all of which is shown by said journal entry of September 18th, 1914.

And be it further remembered that the following is the testimony of Defendant, S. D. Simpson, upon direct examination bearing upon the question of the issuing or putting forth of the certificate of deposit mentioned in the bill of indictment, to-wit:

Testimony of S. D. Simpson.

Q. About how many certificates or deposit had you issued up to the 1st of March, 1913?

A. Something over 1900. I couldn't say.

Q. Can you refer there to the book and tell? About 1900. we will say. Was W. G. Simpson in Caldwell then?

A. In March?

Q. Yes.

A. Yes.

Q. Upon what date did he leave there?

A. About the 20th of March.

Q. About the 20th of March?

A. Yes sir.

Q. Did you and he have any discussion with reference to the imminency of the transfer of these official deposits?

A. We did.

Q. And what, if anything, you should do?

A. We did.

Q. What was that?

A. To raise money to meet the withdrawal that was bound to come, on account of the change of city ordinance dividing the money between the four banks.

Q. Did you set upon any method to accomplish that?

A. Yes.

Q. What?

A. To see if he could raise some money down south to help meet the withdrawals.

Q. Upon what was he to attempt to secure it?

A. On certificates of deposit.

Q. Did you give him anything?

A. Yes.

Q. For the purpose?

A. Yes.

Q. What did you give him, Mr. Simpson?

A. Several blank certificates of deposit.

Q. How many numbers back in the unissued numbers were the numbers that you gave him?

A. I don't understand that question, Mr. Atwell.

Q. Up to the time that he left there and that you gave him those, I assume you had issued a certain number of certificates, the bank had issued a certain number up to that time?

A. Yes.

Q. Did you take out the blanks right then and there, the next that would be used?

A. No.

Q. How far back in the numbers did you go to find those that you did give him?

A. I think about fifty; we must have skipped about fifty.

Q. What numbers did you give him?

A. I think beginning with 1991.

Q. And then how many did you give him?

A. Five or six; I don't remember exactly; several.

Q. Beginning with 1991 and on?

A. Yes.

Q. Why did you skip any?

A. Knowing it would take him time to negotiate these, so that the numbers would be arranged properly on the book.

Q. Did you expect to issue any while he was gone?

A. Yes, we issued them every day nearly.

Q. Was that why you left some there in consecutive order?

A. Yes.

Q. Did you give them to him in blank?

A. Yes.

Q. Did you sign them?

A. I signed them, but no amount or date.

Mr. Atwell: May I ask you gentlemen if you have a blank certificate?

Mr. Smead: Not that I know of.

Mr. Atwell: Q. This is Exhibit No. 3. Is that one of the blanks that you gave him?

A. It is.

Q. Now hold it so that the jury can see it and tell them just what shape it was in when you gave it to him.

A. My name was signed down here. That was all that was written in the certificate

Q. In other words, when you gave it to him none of the blanks in that certificate were filled at all, is that correct?

A. No.

Q. Was the date in it?

A. No.

Q. Was there anything filled in up there as to amount or to whom it was payable?

A. Nothing whatever.

Q. Or when it was payable?

A. No.

Q. The only words you put in at all in writing was your signature, S. D. Simpson, on that bottom line?

A. That's all.

Q. Is that correct?

A. That's correct.

Q. Did you give him any others than this one at that same time?

A. Yes.

Q. About how many?

A. Five or six.

Q. Were they different from this?

A. Just like that.

Q. Exactly?

A. Signed in blank.

Q. Any difference in numbers?

A. Yes.

A.Q. This is 1991.

A. The numbers followed right along.

Q. Consecutively after this?

A. Yes.

Q. And they were also blank except that you put your name, S. D. Simpson, on the bottom there?

A. Yes.

Q. On August 1st, I think that is, 1913, appears a certificate to have been issued to one Mr. Johnson for one hundred and some odd dollars.

Mr. Hawley: That is Exhibit No. 9.

Mr. Atwell: Exhibit No. 9.

Q. What is the number on that, Mr. Simpson?

A. 1991.

Q. Was that the number that was originally on it?

A. No; it was originally 2000.

Q. Was there any other certificate in the bank numbered 2000, blank certificate?

A. Yes.

Q. Tell the jury how that happened?

A. The new certificate we had ordered commenced with the number 2000, and the last certificate of the old ones was numbered 2000, so when we came to 1991 we didn't have a 1991 in the bank, so I either changed it or had it changed, it was changed at my request, one of these two thousands to 1991, and issued to Mr. Johnston, so the numbers would be arranged properly in the register.

Q. Then when you came to certificate number 2000 you found that in the new series?

A. Yes.

Q. And that made no two certificates bearing the same numbers?

A. That is right.

Q. Was that the reason you did that?

A. Yes.

Q. Did you have any idea, Mr. Simpson, as to whether he would be able to do anything with those blanks you had given him or not?

A. I thought he would.

Q. Did you have any idea as to who he might use them with?

A. Well, I didn't know, no, not the names, any special names.

Q. Where was he going with them?

A. He was going to Meridian, Mississippi.

Q. How long was it after that until you heard anything more about those blanks?

A. The latter part of August.

Q. From whom did you hear?

A. W. G. Simpson.

Q. Prior to the latter part of August had there been any money received, a considerable sum, from Mr. Simpson.

A. Yes.

Q. What amount was that?

A. \$2425.00.

Q. How was that received?

A. By check on the Southern National Bank of Louisville, Kentucky.

Q. Did your brother have an account at the Southern National Bank of Louisville, Kentucky, prior to that time?

A. Yes.

Q. How long had he had an account there, to your knowledge?

A. I don't know; quite a while.

Q. Well, about?

A. A few months, I will say.

Q. Why didn't you credit that amount up to certificates of deposit in the bank, instead of to his account?

A. I didn't know that he had negotiated a certificate of deposit.

Q. When did you ascertain that he had negotiated one?

A. The latter part of August.

Q. From whom?

A. From my brother.

Q. From your brother?

A. Yes.

Q. How did you ascertain that?

A. He told me when he came to Caldwell.

Q. How did he happen to find that out?

A. He was looking over his account on the ledger.

Q. What was there on the ledger?

A. And asked about this \$2425.00 credit, to know what that was, and I told him it was the check he sent us on Louisville, and he told me that was for the proceeds of his note, to which he had attached a time certificate of deposit for \$2500.00.

Q. Now prior to the time of his coming there and telling you that, had you received back from him the other blanks?

A. No.

Q. When did you receive the other blanks?

A. The latter part of August.

Q. Along about that time? It was in August, at any rate, that you received the other blanks?

A. Yes.

Q. And you had them for issuance to the regular customers of the bank when you got to those numbers?

A. Yes.

Q. And did you use them in that way?

A. Yes.

Q. As shown by the certificate of deposit book there?

A. Yes, sir.

Q. Are you able to tell the jury as to whether you gave him five blanks or six blanks, or more, or what? What is your best recollection about that?

A. I couldn't say, more than five or six, is my best recollection.

Q. Your best recollection about that?

A. Yes.

Q. Do you recall placing the return blanks among the other unused blanks when they were returned to you?

A. Yes, sir.

Q. In what condition was the bundle of blanks then? Had they come loose and were they bound with a rubber band, or were they mucilaged together?

A. They had come loose, and I just put a rubber band around them.

Q. Now prior to your brother's coming in August, and after you had received the \$2425.00 check, his account shows there a check against it, or a charge against it, of \$1025.00, and your account shows the same credit. How did that charge and that credit arise?

A. I charged my brother's account with \$1025.00 to pay one half of my father's note.

Q. What did you do with the charge, to offset that charge in your brother's account.

A. I credited my account.

Q. You credited your account?

A. I credited my account.

Q. Then how did you pay that note?

A. I don't remember if I gave a check for \$2050.00, paying the note and interest, or whether I gave a check for \$1025.00 and the other in cash.

Anyway the note for \$2000.00 with interest was paid, my brother paying half and me half.

Q. That was a note of your father's, upon which you and your brother were sureties?

A. Yes.

Q. Was that note formerly held by the American National Bank?

A. It was.

Q. And how did you get it out of the American National Bank into where?

A. Into the Boise City National Bank here.

Q. At whose request did you take that note out of the American National Bank and put it in there?

A. It was criticised by the examiner.

Q. Do you remember who the examiner was?

A. Yes.

Q. Who?

A. Mr. Fred Brown.

Q. The gentleman in attendance here?

A. Yes.

Q. What authority did you have to charge your brother's account with that thousand dollars or to draw a check on it?

A. Well, I always had the authority to draw checks against his account. He gave me that authority as a perfect right.

Q. No objection to that?

A. No objection at all.

Q. When did he ascertain that you had paid that note of your father's?

A. The latter part of August.

Q. When he came there?

A. Yes.

Q. When, before the trials in this court, did you see, the first time after you had given blank certificate number 1991 to your brother, did you see it?

A. September 27, when it was presented for payment and I paid it.

Q. What did you do with it when you got it?

Mr. Smead: We object to what he did with it as immaterial.

A. Mr. Walters took it—

Q. Mr. Smead: We object to going into this matter. It is the same matter that has been ruled on several times here.

The Court: He can state what he did with it. Do you mean handed it to someone?

A. When it was presented for payment, Your Honor.

Mr. Atwell: Q. What did you do with it when it was presented for payment?

A. I called a meeting of the directors.

Mr. Smead: We object to going into that matter at all, Your Honor.

Mr. Atwell: Q. Did you hide that certificate anywhere?

A. I did not.

Q. Did you try to conceal it?

A. I did not.

Q. Did you tear it up or destroy it?

A. I did not.

Q. But you took it to the directors?

A. Yes, sir.

Q. In the transaction of these matters about which I have questioned you and the Government had shown here by its testimony, did you have any intent to either injure or defraud that bank?

A. I did not.

Mr. Smead: We object to that question, Your Honor. A man's intent is judged from his actions and not by what he says afterwards.

The Court: He may answer the question. The jury will judge the matter in the light of all the circumstances.

Mr. Atwell: Q. Did you have any intent whatsoever to injure or defraud that bank out of a penny?

A. I did not.

Q. Don't answer this until it is ruled upon. Did you do so?

Mr. Smead: We object to that as calling for a conclusion of the witness.

The Court: Sustained.

To which action of the court in failing and refusing to permit the defendant to show that, as a matter of fact, the certificate of deposit had been ratified by the board of directors, and had been paid by a fund raised from the note of Director Walters to secure which note this defendant had executed a deed to his home and that a few days afterward, the Walters note was paid by a check from W. G. Simpson for the entire amount of \$2500, but that the Bank continued to and still keeps the property deeded to it by the defendant, S. D. Simpson, to which action of the

court, the defendants then and there duly and seasonably excepted and still except.

And be it further remembered in this connection that the defendants and each of them made the following tenders of proof, to-wit, such tender, under the ruling of the court, not being permitted in the hearing of the jury:

Mr. Atwell: The defendants offer to prove by the directors who were directors of the American National Bank on September 27, 1913, that they held a meeting on that date, wherein they had before them the certificate of deposit which is the basis of this indictment, and with knowledge of the facts they ratified its issuance and ordered its payment, and accepted from these defendants \$2500 in payment thereof, plus a deed on S. D. Simpson's home.

The Court: The deed then was given to secure other indebtedness?

Mr. Lingenfelter: No, not originally.

The Court: Then I don't understand you. You say they received the full amount and also took a deed, to secure what?

Mr. Atwell: We offer to prove that after these facts were known with reference to the issuance of this certificate, thereupon Director Walters gave his note for the amount of the certificate, which passed into the loans and discounts of the bank, and the proceeds of that note were used to retire and pay the certificate. Simultaneously with the giving of Walters' note, S. D. Simpson deeded his home to

Walters or the bank, that within one week's time thereafter, W. G. Simpson, when he learned of the facts, sent his check for \$2500, plus, to pay in full the certificate of deposit, No. 1991, and the bank continued to keep the deed to defendant, S. D. Simpson's home.

The Court: The tender is declined.

Which testimony the court then and there refused to permit the defendants or either of them, to which action of the court in so failing and refusing, the defendants then and there, duly and seasonably, in open court, excepted and still except.

And be it further remembered that the defendant, W. G. Simpson, testified with relation to the certificate in question as follows, to-wit:

W. G. Simpson. (Extract from testimony on direct.)

Mr. Hawley: Q. While there on that occasion did you investigate the condition of the American National Bank?

A. In a way I did

Q. Did you have any understanding as to its financial condition so far as being threatened with loss of deposits was concerned?

A. I was informed at the time that they had a large amount of public money on hand, state and county and city, which aggregated several thousand dollars.

Q. Did you receive any information with reference to threatened withdrawals of a portion of these funds?

A. Well, I learned that there was a movement on foot to divide some of the city funds, and probably a withdrawal of some of the county funds in a short time.

Q. Did you inquire into the effect that this would have upon the bank, so far as its legal reserve was concerned?

A. I don't know that I inquired into it, but I was informed that it would reduce the cash to the extent of the withdrawals.

Q. Who did you take this matter up with, if anybody?

A. Well, the matter I think was taken up with me. Most of the conversation, perhaps all of it, was with my brother. He was the active cashier, active officer in the bank.

Q. Was there any conclusion come to in regard to relief?

A. I didn't get that question.

Q. Was there any method devised to relieve this condition?

A. Well, there was some suggestions offered about getting money at the proper time, arranging for the distribution of these funds.

Q. What arrangement, if any, was finally made?

A. Well, there was several suggestions made. Among them was to raise some money on time certificates of deposit, others by rediscounts or executing notes to some of their correspondents.

Q. What was finally concluded upon, when, and by whom?

A. Well, I thought I might be able to raise some money down south on certificates of deposit. I don't know. I agreed to make an effort along that line, and before I got ready to leave I was given five certificates of deposit, signed in blank, that is, the cashier's name was signed to the certificates, but they wasn't filled out for any amount. Those certificates were numbered 1991 to 1995 inclusive.

Q. Was the name of the payee put in these?

A. It was not.

Q. Nor the sum?

A. Nor the amount. Neither was the date inserted.

Q. Was there anything done so far as these certificates were concerned outside of the signature of the cashier?

A. I think I gave a receipt for them, is my recollection, that I gave a receipt for the certificates.

Q. Was there anything done so far as marking or filling out these certificates, outside of signing the cashier's name?

A. There was not.

Q. When was this done, as near as you can recollect? If you can't recollect the date, state it with reference to the time you left Caldwell.

A. Well, it must have been done back somewhere between the 17th and the 20th of March; I couldn't state positively.

Q. Who gave you these certificates?

A. My brother, S. D. Simpson, the cashier.

Q. And you took them, did you?

A. I did.

Q. What was the understanding in regard to them at the time you took them, as to what disposition you would make of them?

A. Well, the understanding was that if I could negotiate any of them I was to do so, and send the money in to the bank, and give him the number of the certificate, and the date, and the amount, and who it was made out in favor of.

Q. And who was to do the filling in so far as the amount, and number, and the date and all that?

A. I was to do that.

Q. Was there any particular persons mentioned or any particular institutions with whom you were to deal, or was that left open?

A. That was left open with me, because I didn't know just where I could handle them.

Q. What was the understanding as to the disposition of any funds arising from the sale of these certificates?

A. I was to remit him or remit on Chicago for the credit of the bank, either.

Q. When you say remit to New York or Chicago, what do you mean? Did you have correspondents there?

A. Remit to the correspondents of the bank for their credit.

Q. To the credit of the Caldwell bank?

A. Yes, to the credit of the American National Bank of Caldwell.

Q. Was there any particular method agreed upon

under which this should be done, or through which this should be done, outside of that which you have stated?

A. No, I don't think there was.

Q. Do you remember the date you left Caldwell?

A. No, I couldn't state the date positively. It was somewhere between the 16th and the 20th, I think.

Q. Then these certificates were in your possession how long before you left Caldwell?

A. I don't remember whether they were given me the day I left there or the evening before I left; I don't know whether I left at night or in the day. This is a matter of presumption on my part. If I left there in the day they were given me on the day before I left.

Q. You were still acting as president of the bank at this time, that is, your successor had not been elected?

A. No, my successor hadn't been elected at the time.

Q. You occupied that position then?

A. Well, I presume so.

Q. State where you went from Caldwell.

A. Well, I first went to Chicago and stopped off there I think a couple of days, maybe one day and night, and then I went from there to Lexington, Kentucky, and stopped there I think about a couple of days, and then to my home in Meridian, Miss.

Q. You may state whether you were still engaged in the banking business at Meridian at this time.

A. I wasn't at that time, no.

Q. And did these visits to Chicago or Lexington have anything to do with the attempted disposition of certificates?

A. My stop over in Chicago did, but not in Lexington. That was a social visit there, among relatives.

Q. You may state if you made efforts to dispose of them in Chicago.

A. I made some inquiries in Chicago as to the probability of disposing of them, but didn't get encouragement, and I didn't mention the fact any more then until I got home to Meridian, Mississippi.

Q. You may state what measures you took, if any, after reaching home, what efforts you made to dispose of these certificates.

A. Well, I approached a few individuals there who I knew had money, to know if they would like to handle some of them for six months, and they made some inquiries about the bank and its location, and I told them where it was, and they intimated that it was most too far away, and they didn't care to handle them that far away from home; and I wrote some letters to some friends in Kentucky, and among the number that I wrote to was Mr. W. L. Baker, cashier of the Monticello Banking Co.

Q. Wrote to them on this subject?

A. Yes, I wrote him on March 31st, asking him if he could—

Mr. Smead: We object to any statement of what he asked him. The letters are in evidence.

The Court: Sustained.

Mr. Hawley: The letter you wrote is in evidence. You supplied copies of that correspondence when Mr. Baker was on the stand, did you not,—this correspondence you gave to me?

A. Yes. There is some here in evidence, but—

Q. Was that all of the correspondence?

A. No.

Q. Was this particular letter you refer to, the first letter in evidence, all?

A. No, that isn't all. I wrote him March 31st, and he answered it on April 2nd.

Q. This letter of March 31st has not been produced in evidence?

A. I don't think it has.

Q. Was there a copy of it produced in evidence?

A. I don't think there was.

Q. Have you a copy of it? Did you search for the copies of your correspondence with Baker?

A. Yes, I searched for a copy of that first letter I wrote him, and couldn't find it, and I wrote to him to furnish me the original, but he didn't have it.

Q. You may go on and state what you wrote to him in that first letter. State the contents of it.

A. I wrote him and asked him if he could handle \$2500 or \$5000 worth of these certificates of deposit, to run six months, and he answered and said—

Mr. Smead: We object to what he answered.

Mr. Hawley: Q. Is his answer to that letter on file?

A. It is on file here.

Q. That is one of the letters on file of date April 2nd, is it not, about that time?

A. It is either April 2nd or April 3rd, in answer to my letter of March 31st.

Q. Well, leaving out the correspondence, what was finally done with reference to this matter?

A. He agreed to loan me \$2500, and take one of the certificates or a \$2500 time certificate as collateral. He enclosed me a blank note to execute, which I did. I executed the note, and filled out the certificate on the 9th day of April.

Q. Filled out the certificate of deposit?

A. Yes, on the 9th day of April, for \$2500, in my favor, attached to my note, and sent it to Mr. Baker, as cashier of the Monticello Banking Company.

Q. What date did you put on that certificate?

A. March 27th.

Q. Why did you put on March 27th?

A. Well, my note was dated April 9, 1913, and was due six months after date, which would make it due about October 9, 1913, and I dated the certificate back long enough to make it fall due by the time my note did, so I would have the money to take my note up with when it fell due, as I was getting the money for the bank.

Q. You may state what you did, if anything, so far as transmitting the proceeds of this transaction to the bank.

A. Well, when I filled out the note and signed it and mailed it to him, I wrote him to remit me—

Q. Wrote who?

A. Wrote Mr. Baker, the cashier of the Bank, to remit me the proceeds of it to Lexington, Kentucky, as I was going up there about the same time that my letter left home. I got there, and received that letter on the 11th day of April, with a draft in it drawn on the Fifty Third National Bank of Cincinnati by his Bank for \$2425.00. I endorsed that draft and mailed it to the Southern National Bank of Louisville for my credit,—I had an account with that bank,—on the 11th day of April, and on the same day I drew my check on the Southern National Bank of Louisville in favor of the American National Bank of Caldwell, and enclosed them the proceeds of this money that I had secured on this certificate and my note.

Q. What was the proceeds?

A. \$2425.

Q. And the certificate itself was for \$2500?

A. \$2500. The interest for six months was deducted from my note, which left \$2425 net.

Q. You may state what you did with that check that you drew.

A. I enclosed it in a letter to the American National Bank of Caldwell.

Q. Is this the check that has been testified to heretofore and marked Exhibit No. 3, the check to the American National Bank?

A. No. I have that check in my pocket.

Q. Will you produce that check?

A. I will.

Q. This is the same certificate that was num-

bered 3 in evidence, the certificate you have been testifying to?

A. I don't know the number, Governor. Do you want the stub of my check book too?

Q. I hand you defendant W. G. Simpson's Exhibit for identification marked "A" and ask you what that is.

A. This is my check drawn on the Southern National Bank of Louisville, Ky.

Q. Don't state the contents. That is the check you have testified to?

A. Yes.

Q. That is the check you gave at that time?

A. Yes, that is the check I gave at that time.

Q. You may take Defendant W. G. Simpson's Exhibit B for identification, and state what that page marked is. Just state whether it is your check book or not.

A. This is my check on the Southern National Bank of Louisville.

Q. Is that the stub?

A. With the record of that check.

Mr. Hawley: The check itself then, if Your Honor please, we will read to the jury (reading check).

Q. I want to ask you in regard to these figures there, those figures in pencil. What are they?

A. That is 2425. I don't know who put that there. That is a memorandum somebody put there.

Q. That is often done in banks, is it not, when there is doubt about the figure?

A. Yes.

Mr. Hawley: If your Honor please, I desire to introduce as part of this evidence the stub book.

Q. I will ask before I do this, when was this entry made in this check book?

A. On the 11th day of April, 1913.

Q. Right at the time you drew the check?

A. I always fill out the stub before I draw the check, and then I fill the checks out following.

Q. It was done in the regular course of business, as you do business?

A. Yes.

The Court: What do you offer this for?

Mr. Hawley: For the purpose of showing the good faith of the party, the record of this whole transaction, in a continuous say, having the entire record before the jury, showing that it was done in absolute good faith, showing that—

The Court: But what does it tend to prove? I don't see how it bears on the question of good or bad faith.

Mr. Hawley: It shows that the check was drawn in the regular course of business, your Honor, as a regular business transaction. All those things when done in that way go to the bonafides of the party.

The Court: The objection is sustained.

Mr. Hawley: Q. You say that you wrote a letter, or you say that you sent this check to the American National Bank?

A. I did.

Q. Of Caldwell?

A. Yes.

Q. Directed to whom?

A. Directed to S. D. Simpson, cashier of the American National Bank of Caldwell.

Q. You say that you wrote a letter at that time?

A. I did.

Q. And did you retain a copy of that letter?

A. I did.

Q. Have you a copy of that letter?

A. I have.

Q. Please produce it.

(Witness complies).

Q. Is this the impression copy of the letter?

A. It is.

Q. Was the original letter sent in the same way or without alteration, except so far as this is concerned?

A. It was.

Q. It is a copy of the letter as sent?

A. That is a copy of the letter that went with the check.

Mr. Hawley: Please mark this Defendant W. G. Simpson's Exhibit C, for identification.

Said document was so marked.

Q. Was the envelope containing the check and the letter duly mailed by you?

A. It was.

Q. And deposited in the United States postoffice?

A. Yes.

Q. Your signature is not to this copy of it?

A. No, that is just a copy.

Mr. Hawley: We desire to present this letter, gentlemen.

Q. Was there any other letter sent besides this one, the original of which this is a copy, by you, in regard to this matter, at that time?

A. There was not.

Q. That was the only letter?

A. Yes, sir.

Mr. Hawley: I will read to you defendant's Exhibit C, gentlemen. (Reading Defendant W. G. Simpson's Exhibit C.).

Defendant W. G. Simpson's Exhibit C.
Copy.

April 11th, 1913.

Mr. S. D. Simpson, Cashier,
American National Bank,
Caldwell, Idaho.

My Dear Brother:

I have succeeded in placing your Time Certificate No. 1991 for \$2,500.00 and enclose you herewith my check on the Southern National Bank of Louisville, for the proceeds of same \$2,425.00.

I could not place the certificate direct but had to put up my note for the amount and attach the certificate to same as collateral, therefore it is made out in my favor and dated March 27th, and due six months after date which will mature in ample time to take care of my note.

You will therefore debit "Interest Paid" \$75.00 and my check enclosed for \$2,425.00 will make the credit of the certificate \$2500.00 which I suggest that you enter as "Time Certificates for Money Bor-

rowed" while the C-D is not in a way placed, it is placed because it is out as collateral to my note for the use of the bank.

I had to pay 6% for the money as I could not get it at 5%. Could I have gotten it at 5% rate direct without having to put up my note, it could be entered as a regular C-D but money is tight in this section as well as in the West.

I hope this will give you some relief and if I am able to handle the others or any of them will do so and report to you giving numbers dates amounts and etc. so that the proper entry can be made at that end of the line, in the meantime I hold the other certificates subject to your orders and I assure they are safe in my deposit box and will be taken care of and accounted for to you at any time.

Your last statement shows a good reserve and I cannot understand why you should carry such a large reserve, for 15% is all required by law but I believe you should carry in that section at least 25%, but its better to be "safe than sorry" so keep close to the shore and if you need help I will do all I can to assist you.

It would be a difficult matter to place your "C-D" so far away from home even if you pay 1% more than the banks here do, and I have some doubts as to being able to handle them unless I do as I had to do this one, make a note for the amount in addition to the certificate itself.

With love from us all to you yours, I am,
Your brother.

Q. The original of this was signed with your name?

A. Yes, sir.

Q. When you mention C. D. in capital letters there, what do you mean?

A. Certificate of Deposit.

Q. That is the term that is used among bankers?

A. That is the term by which we designate certificate of deposit. C. D.

Q. I see there is no place marked on this letter showing the place from which it was written. Do you remember what letter head you used and whether those letter heads were printed?

A. That was written from Lexington, Kentucky.

Q. On a printed letter head?

A. I think it was on some of my stationery that I had been using, a printed letter head, is my recollection.

Q. You may state to the jury whether or not you made further effort to dispose of these C. D's.

A. Yes, I made some other efforts to dispose of some of them.

Q. With what success?

A. Without any success.

Q. What time was it you next was in Caldwell after sending this letter and this check?

A. I think it was along in August, some time in August, 1913, somewhere from the 15th to the 20th of August, is my recollection.

Q. Where in the meantime had you been?

A. I had been at Lexington, Kentucky, since about the first of May, had been living there.

Q. Had you engaged in banking there?

A. I was. I was connected with a bank temporarily.

Q. And do you recollect the time that you came to Caldwell in August, 1913? Can you give us the date with any greater certainty than saying it was in that month?

A. It must have been around the 18th, somewhere from the 15th to 18th, that I got to Caldwell in August.

Q. Did you come alone or with your family?

A. No, my family was with me. We came part of the way through the country in an automobile.

Q. A business trip or a vacation?

A. A kind of a vacation and business trip combined.

Q. After reaching Caldwell did you make any examination, or did you have any talk with any of the officers of the bank with reference to your banking matters to your account in the bank, or did you make any examination of it?

A. After I had been there a day or two I asked something about how my account stood.

Q. You may state whether or not you had deposited money and had been drawing out money on your checks?

A. I had. I had been depositing and drawing regular on the bank, and sending money there for credit.

Q. You had kept a regular checking account there, had you?

A. Yes, I kept a regular checking account there.

Q. And did you examine, or had you received during this time your bank statements?

A. No, I had not.

Q. Were you in the habit of receiving your bank statements from the bank at Caldwell?

A. No, not regularly. Every once in a while I would get a statement, maybe six months or three months, something like that, but I hadn't had one I don't think that year.

Q. You hadn't had one since sending this \$2425?

A. No, I don't think I had had one since January of that year.

Q. Did you make any examination of your account?

A. Yes, I looked over it and saw some entries there that I didn't understand, and I asked some questions about them.

Q. What entries do you refer to?

A. Well, I refer at this particular moment to a credit there of \$2425.

Q. Who did you ask in regard to that after you ascertained it?

A. I asked my brother, S. D. Simpson, the cashier.

Q. State what was said and done.

A. I asked him what that was, and he said he would look it up, and he went into it and informed me in a few minutes—it didn't take him long—that that was my check drawn on the Southern National Bank of Louisville, for \$2425, that I had sent him some time in April, and when he told me what it was

I told him that that was for a time certificate of deposit, and should not have been entered to my credit, and he said he didn't know it, and I told him I wrote him a letter with it. He said he didn't remember about the letter, and he would look it up, and he spent several days there looking for the letter, but he couldn't find it, and when my trunk got in out there I looked in my letter files and got the copy out and showed him. That was about the result of that particular item.

Q. You may state if about this time you made any effort or if you made any effort up to this time to have an extension of your note with this collateral?

A. No, I had not.

Q. State whether or not you had come to any conclusion at this time with reference to that. If so, what it was.

A. We discussed the matter there.

Q. When you say we, who do you mean?

A. I mean me and my brother. We discussed the matter there for a few days, and I said this certificate was out but it hadn't been entered, and we would just take it up, and he suggested that I write to Mr. Baker, the cashier of the Monticello Banking Company, for a renewal, that he couldn't very well handle it before January; so at his request I wrote Mr. Baker for an extension or a renewal of the note, if it was convenient for him to grant it, I would like to have it, so that it would give him some little while to get the money in.

Q. Do you remember where you wrote this from? Was it from Caldwell, while you were there?

A. I wrote that letter from Caldwell, Idaho, is my recollection.

Q. You may examine Plaintiff's Exhibit No. 21, and say whether that is the letter, or a copy of the letter you wrote at that time.

A. It is.

Q. You may state if in the copy of that letter you gave him any directions as to where to write to you?

A. I told him to notify me at Lexington, Kentucky. I was going to go back there in a few days.

Q. What was your intention at that time so far as going away from Caldwell and going back home?

A. I had some business back there to look after, and I was on my way there for that purpose.

Q. You had business to look after in Lexington?

A. I did.

Q. What time did you actually leave Caldwell, if you recollect, to go back to Lexington?

A. I couldn't state, but it was a few days after I wrote that letter.

Q. And you did go to Lexington?

A. I did, yes.

Q. Do you remember what time it was you got to Lexington?

A. No, but it was some time in September. I couldn't give the date of the month, nor the day of the week, but the only way which I can refer to it, is, I went to Lexington from Louisville, after the Kentucky Bankers' Association had adjourned. I at-

tended that in Louisville that week, but I couldn't give the exact date.

Q. Did you hear from Mr. Baker after getting there?

A. I did.

Q. You received one of these letters that has been put in evidence?

A. Yes.

Q. Did you ascertain from his letter whether or not this extension of time could be given?

A. I inferred from his letter that he didn't care to extend the time, and had forwarded the certificate for collection.

Q. You may state what your object and intent was in asking for that length of time, for that extension of time on that note, as shown by your letter?

A. Well, it was to give the bank a few days or a few months, if necessary, to get up the money in.

Q. That is, the American National Bank?

A. Yes.

Recess until 2 P. M.

2 P. M.

Q. I believe, Mr. Simpson, when we concluded this forenoon, that you were being questioned with reference to what you did after leaving Caldwell in August, and that I had inquired of you with reference to your communication with Mr. Baker and his bank in regard to an extension of time. That is correct, is it not? You had communicated with him asking for the extension of time?

A. I had, yes.

Q. And this was done by letter that you wrote at Caldwell, the letter that is in evidence?

A. Yes.

Q. And how long was it after you got home before you went to Lexington? You have spoken at attending the banquet in Lexington.

A. Just as soon as the Kentucky Bankers Association convention adjourned I went to Lexington that night.

Q. Did you there receive the letter from Mr. Baker that has been introduced in evidence?

A. I did.

Q. That was the letter that informed you that the certificate had been sent on?

A. Yes.

Q. Did you go again to Caldwell after that?

A. Yes, I came back to Caldwell some time in October, I think it was.

Q. Was that September or October?

A. I don't know, but I am inclined to believe it was October.

Q. Your memory is not clear. You have no way of fixing that date positively?

A. No, I can't fix the date exactly from memory.

Q. After you returned to Caldwell what, if anything, was done by you with reference to this certificate of deposit, and this check that was issued? Don't answer this question until the objection is made.

A. When I arrived there in October I was informed that the certificate had come in and had been paid, and I was told how it was paid, and I gave my

check to the bank for \$2500 on the Citizens National Bank of Meridian, Mississippi.

Q. What did that \$2500 that you paid at that time by your check include?

A. That included the face of the certificate—it included the proceeds of my note, plus the discount, or, in other words, it included the face of the certificate, not including the interest that had accrued on the certificate.

Q. You may state whether or not that check was paid?

A. It was.

Q. It was paid to the bank, to the American National Bank?

A. It was. It was made payable to the bank.

Q. Was there afterwards a refund on account of that check that you made? If so, in what amount, and how did it come about?

A. Well, the interest that had accrued on the certificate was collected when the certificate was paid, and the whole amount was remitted to the Monticello Banking Company, and when they received returns got it they remitted me a draft for the accrued interest, less the cost of collection and so on.

Q. What was that amount?

A. I don't remember the amount. I never saw the draft. It went to Caldwell and was received there and went into the bank there.

Q. You heard the testimony given in regard to the check or draft of \$62.50, did you not?

A. Yes, I heard that.

Q. You may say whether that is the check or draft that you refer to now?

A. That is the one I refer to now.

Q. And why was that discrepancy in the amount that was paid by the bank on the certificate and the amount received by you? How did that come about?

A. Well, my note was discounted in the beginning for six months. I only got \$2425. And the certificate bore interest for six months on the face of it. At the end of the six months the certificate called for \$2562.50. My note only called for \$2500.

Q. That gave the rebate, did it?

A. Yes, that was a rebate.

Q. You may state, after you returned in September or October, which ever it may have been, whether you ascertained that your account was in the same condition that it was when you left, the latter part of August, so far as your being credited with the \$2425 was concerned?

A. It was, so far as I remember, if I understand your question.

Q. You may state, Mr. Simpson, if at the time this transaction was consummated in Caldwell and this note or these certificates of deposit were taken from the cashier by you, they were taken by you with any intent on your part to injure or defraud the American National Bank in any way whatsoever?

A. None whatever.

Q. When you gave over these certificates in Kentucky, or this particular certificate of deposit num-

bered Plaintiff's Exhibit A, in Kentucky, you may state whether or not at the time of its delivery to the bank you were actuated in any way whatsoever by any intent to injure or defraud the American National Bank of Caldwell?

A. None whatever. My only intention was to help the bank raise some money.

Mr. Atwell: Q. Mr. Simpson, when the blanks were handed to you at Caldwell, among which was the blank number 1991, you put them in your pocket and took them away with you?

A. I did, yes.

Q. In the blank shape?

A. I did, yes.

Q. Without any names or dates or amounts or payee or maturity filled therein?

A. The only thing that was on them was S. D. Simpson's name as cashier. The balance was all blank.

Q. Tell the jury when and where 1991 was filled in, and by whom.

A. It was filled out at Meridian, Mississippi, on the 9th day of April, 1913, by me, on a typewriter, made out in my favor for \$2500, and dated the 27th day of March, 1913.

Q. At the time you did that your brother S. D. Simpson had no knowledge to whom that would be payable, nor its date nor amount, nor its maturity, did he?

A. None whatever, until he got my letter giving him the information.

Q. I didn't ask you that. When you did it, he had no knowledge of it?

A. No, he had no knowledge of it. I was to notify him.

Q. When you left the Southern Division of the Idaho District of the United States Court, when you left Canyon County, you left here with these certificates blank and nothing in them or on them, didn't you?

A. Nothing but the signature of the cashier, is all.

Q. Now at what time, is it your recollection, that you returned the other blanks, and how did you return them?

A. My mind isn't exactly clear on that. It seems to me like I returned them by mail in July, but I am not sure.

Q. At any rate you kept them some time, and didn't succeed in negotiating them, and then sent them back?

A. I kept them some time trying to negotiate some of the rest of them or all of them, but seeing it was a difficult matter to do so I sent them back, I think it was in July.

Q. Now this certificate appears to be dated March 27th, 1913. Who put that date on there?

A. I did.

Q. It appears to be dated at Caldwell, Idaho. Who put that on there?

A. That was already on there, printed on there.

Q. It appears to be payable to the order of W. G. Simpson. Who put W. G. Simpson on there?

A. I did, with a typewriter.

Q. It appears to be for the sum of \$2500. Who put that amount in there?

A. I did.

Q. It appears to be due in six months after its date. Who put that in there?

A. I did.

Q. At the time and place you have just testified to?

A. April 11, 1913, at Meridian, Mississippi.

Q. Why did you date that certificate back? If it was April 11th that you made it out, why did you date it back to March 27th?

A. I wanted to give it ten days or a couple of weeks to collect it, so that it would meet my note when it fell due.

Q. Your note was dated when and was due when?

A. My note was dated April 9, 1913, due six months after date, which would make it about October 8th or 9th. And I wanted this certificate collected in ample time so as to meet my note when it fell due.

Q. Were you at that time solvently responsible so that you could have paid that note yourself, your \$2500 note?

A. I think I could. Of course that is my—

Q. I know that is your business, but—did you thereafter pay twice that much to the American National Bank of Caldwell?

Mr. Smead: We object to that.

The Court: Sustained.

Mr. Atwell: Q. Now then you testified a while ago that you gave your check for \$2500 in settlement of this certificate, along about the first of October. Do you know what identical transaction took place in the bank at that time, what identical piece of paper it took up?

Mr. Smead: We object to that, your Honor.

The Court: He may answer yes or no. Just answer yes or no, whether you know or not, of your own knowledge.

A. No.

Mr. Atwell: Q. When you got there in the early days of October you ascertained that the certificate had been paid.

A. Yes.

Mr. Atwell: That is all.

Mr. Hawley: Q. What was your object and purpose in giving that check at that time.

Mr. McClear: We object to that. That has already been testified to.

The Court: Sustained.

And be it further remembered to this connection that the Government offered testimony to show and the fact is that there was no money, or any equivalent, deposited for the \$2500 certificate until September 27th, 1913, when the certificate was returned by the Monticello, Kentucky, Bank, for collection and was received at Caldwell, nor was the said certificate entered in any manner upon the books of the bank, nor did the defendant, S. D. Simpson tell any

one connected with the bank that it was out, or had been issued, nor did he make any disclosure thereof to the Bank Examiner, nor to any of the directors, save and except that when the same came in for collection, he took the same to the directors as herein before shown. That there was no testimony, whatsoever, that the blank certificate was filled out anywhere or at any time or place with date, amount, payee, or maturity, save and except as detailed in the foregoing testimony of the defendant, W. G. Simpson.

And be it further remembered that when W. G. Simpson sought the loan from the Monticello holder, that holder replied he would make a \$2500 loan on W. G. Simpson's note with certificate of deposit on collateral and that he would not have made the loan without such collateral and that the Monticello holder testified that he knew nothing about it being a loan for the bank, but that it was, so far as he knew, a personal loan to W. G. Simpson.

And be it further remembered that a short time before the loan matured W. G. Simpson wrote the Monticello holder asking for a return of the certificate and that he be allowed to substitute stock in the American Trust Company of Caldwell, Idaho.

And be it further remembered that the defendant, W. G. Simpson, and the defendant, S. D. Simpson, having testified that in August, 1913, S. D. Simpson had ascertained for the first time that the \$2425 credit which he had entered to the account of W. G. Simpson had really arisen from the sale of the certifi-

cate of deposit, such information coming from W. G. Simpson, who was at that time in Caldwell; that thereafter the Government, over the objection of the defendants, and each of them, was permitted to prove and offer testimony showing that in September, 1913, and prior to September 27th, 1913, the defendant, W. G. Simpson, had borrowed \$3500 from the American National Bank, to which testimony the defendants then and there, duly and seasonably, in open court, excepted and still except.

And be it further remembered that the certificate set forth in the indictment was introduced in evidence and all of the marks and figures and endorsements as set forth in the indictment were contained thereon, and the same on the face thereof read as follows, to-wit:

At Caldwell, Idaho, March 27, 1913.

No. 1991.

W. G. Simpson has deposited in this Bank Twenty-five Hundred and No-100 Dollars payable to the order of himself in current funds on the return of this certificate properly endorsed, six months after date, with interest at five per cent per annum, no interest after maturity.

S. D. SIMPSON, Cashier.

Due Sept. 27.

That the certificate when handed to W. G. Simpson by S. D. Simpson, so the defendant testified, did not contain the words "March 27, 1913," nor the payee, W. G. Simpson, nor the amount Twenty-five Hun-

dred and no hundredths, nor the words, "six months after date," nor the words "due September 27th."

And be it further remembered in this connection that the witnesses Walters, Bradshaw, Devers, Forbes, Porter, Walker and Gates, testified as directors for the American National Bank and that they held such offices on September 27, 1913, and prior thereto; that they had not consented to the issuance of the certificate in question, nor had any knowledge thereof until September 27, 1913, when they ordered the same paid; that they knew that Cashier Simpson was issuing from time to time certificates of deposit, and that his action with reference thereto met with their approval but that they never intended to authorize him by implication or otherwise to issue a certificate of deposit unless the money or equivalent thereof had actually been deposited therefor; that when the certificate in question was brought to them on September 27, 1913, by S. D. Simpson, they held a meeting.

And be it further remembered in this connection that thereupon the defendants offered to prove by said witnesses that they as directors had held a meeting on September 27, 1913, with reference to said certificate of deposit, such meeting being called upon notice of S. D. Simpson, and that the facts with reference to the issuance of said certificate were then and there made known to the said directors and thereupon Director Walters gave his note for the amount of the certificate, which passed into the loans and discounts of the bank and the proceeds of that

note were used to retire and pay the certificate. Simultaneously with the giving of the Walters note, S. D. Simpson deeded his home to the bank, that within one week's time thereafter W. G. Simpson when he learned of the facts, sent his check for \$2500 plus, to pay the certificate of deposit No. 1991 in full, and the bank continued to keep the deed to defendant S. D. Simpson's home, which tender and offer and desire of the defendants to introduce said testimony and proof the court then and there declined and refused, but did direct proof that the defendant paid the amount of this certificate at that time, to which action of the court in so declining and refusing to permit the said testimony, or any part thereof, the defendants then and there, in open court, duly and seasonably, excepted and still except.

And be it further remembered that upon the rebuttal the Government offered testimony to the effect that the public deposits in the American National Bank from March 20, 1913, to September 1, 1913, continued to increase.

And be it further remembered that thereafter on, to-wit, March 2, 1915, and defendants and each of them presented their certain written motion in arrest of judgment for the reasons therein more particularly specified, which was on said date submitted to the court and the court after hearing the same and having heard the argument thereon, overruled, to which action of the court, the defendants then and there, in open court duly and seasonably excepted and still except.

And thereafter, by it further remembered, on the third day of March, A. D. 1915, the defendants presented their certain written motion for a new trial to the court but that the court, after having heard the same in all things overruled the same and refused to grant a new trial, to which action of the court, the defendants then and there, duly and seasonably, in open court, excepted and still except,

And be it further remembered that while the witness, W. G. Simpson, was testifying for himself and after he had testified that he had forwarded the \$2425 realized from the certificate of deposit by a check on the Southern National Bank of Louisville, the following happened, to-wit:

Q. Did you take this check from a check stub book?

A. Yes, sir. I filled out the stub first and then filled the check and detached the check.

Q. The entries were made at the same time were they?

A. Yes, sir.

Mr. Hawley, for the defendant: I now offer the check stub.

The Court: What do you offer it for?

Mr. Hawley: For the purpose of showing the good faith of the parties and the record of the whole transaction.

The Court: What does it tend to prove? I don't see how it bears on the question of good or bad faith.

Mr. Hawley: It shows that the check was drawn in the regular course of business. All those things

when done in that way go to the bona fide of the party.

The Court: The objection is sustained, to which action of the court, the defendants and each of them, then and there, in open court, duly and seasonably excepted and still except.

The above and foregoing constitutes the agreed bill of exceptions in the said cause and the United States by their District Attorney and the defendants by their respective attorneys, here now tender and same and ask that the same be examined, allowed and approved and made a part of the record herein, which is hereby accordingly in all things done, and the same and the foregoing is and shall be and is hereby declared to be the bill of exceptions in the foregoing styled and numbered cause.

Dated this, the 3rd day of March, A. D. 1915.

FRANK S. DIETRICH,

U. States District Judge, Presiding.

Endorsed: Filed Mar. 4, 1915. A. L. Richardson,
Clerk. By Pearl E. Zanger, Deputy.

ASSIGNMENTS OF ERROR.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

No. 563.

Come now the defendants in the above entitled and

numbered cause and file the following as their assignments of error committed upon the trial of said cause and on account of which they, and each of them pray a reversal of the judgment therein, to-wit:

I.

The court erred in overruling the defendants' plea of jeopardy and former acquittal.

II.

The court erred in overruling the defendants' demurrers and motion to quash the indictment herein.

III.

The court erred in refusing to permit the defendants to prove by themselves and the board of directors of the American National Bank of Caldwell, that the issuance of the certificate of deposit in question was ratified by the board of directors as soon as they knew it had been issued and arranged for its payment by the discounting of Director Walters' note.

IV.

The court erred in refusing to permit the defendants to show by the defendant, S. D. Simpson, that he, the said defendant, S. D. Simpson, executed a warranty deed to his home, which was of greater market value than the certificate in question, which property, after the retirement of the Walters note by the complete payment thereof, by the defendant, W. G. Simpson, was retained by the bank and has never been returned to the defendant, S. D. Simpson, such testimony bearing directly upon the question of intent and being admissible after the Government had

been permitted to prove the entire transaction from March to September 27th, inclusive.

V.

The court erred in that portion of his general charge to the jury wherein he instructed the jury that the phrase and words, "issued and put forth," as used in the bill of indictment, were fully satisfied by the placing of the blank certificate of deposit in question in the hands of the defendant, W. G. Simpson by the defendant S. D. Simpson, in the State of Idaho, even though such blank certificate did not, in fact, contain either date, name of payee, amount, or maturity, and even though such certificate did not, in fact, pass out of the hands of W. G. Simpson until a much later date and in a different state, to-wit, the State of Mississippi, where the date and name of payee and amount and maturity were put therein by the defendant, W. G. Simpson without the knowledge of the defendant, S. D. Simpson, and thereupon negotiated to an innocent holder in the State of Kentucky, because such instruction permitted the jury to convict these defendants for an offense committed beyond the jurisdiction of this court. This matter was called to the attention of the court by special instructions.

VI.

The court erred in instructing the jury that they might convict the defendants, either or both of them, if they believed beyond a reasonable doubt, that the defendants or either of them had without the consent

of the board of directors, etc., issued the certificate in question with the intent to injure or defraud, because the indictment charged such intent to be in the conjunctive, to-wit, that such issuing and putting forth, etc., was done with the intent to injure and defraud.

VII.

The court erred in charging the jury that the intent required by the statute and charged in the indictment could be presumed and the jury would be authorized in presuming it from the spending and use of the \$2425.00, which the defendant, W. G. Simpson, had realized upon his own note attached to which was a certificate of deposit which he had made from a blank given him by S. D. Simpson, because any intent that might have been in the minds of the defendants at the time they were using such \$2425.00 would not meet the measure of the law or the allegations of the indictment, unless such intent had also existed at the time the certificate in question had been issued or put forth, even though such subsequent use might, in reality, constitute another sort of an offense against the National Banking Law.

VIII.

The court erred in overruling the defendants plea of jeopardy and former acquittal, because at the trial of this case at the September, 1914, term, a jury was empanelled, the defendants entered their plea, witnesses were sworn, testimony was taken and the arguments of counsel were had, all of which occupied more than three days of the court's time at the end

of which time, the defendants asked for an instructed verdict on the ground that the indictment did not allege that the certificate was put forth without the consent of the board of Directors, whereupon the court, of his own motion, discharged the jury over the protest and exception of the defendants, because even though such indictment may not have contained a clause sufficient to have made it correct for the unlawful issue of a certificate of deposit, the same did, in fact, charge an offense under the National Banking laws, to-wit, that of misapplication.

IX.

The court erred in overruling the defendants' demurrer and motion to quash the bill of indictment, because said indictment is, in fact, duplicitous in that it attempts to charge more than one offense in the same count, to-wit, the commission of an act to injure the bank, the commission of an act to defraud the bank, the issuing of a certificate of deposit, and the putting forth of a certificate of deposit, four separate and distinct felonies.

X.

The court erred in overruling the defendants' demurrer and motion to quash the indictment, because the said indictment states no offense against the laws of the United States, in that the facts therein attempted to be alleged, might be entirely innocent, because the statute does not require that one shall have on deposit with a bank that issues to him a certificate of deposit, the sum of money therein specified, nor any part of it.

XI.

The court erred in refusing to permit the defendants' counsel to advise the jury in their argument that a conviction of the defendants would mean a penitentiary sentence, because the jury retired to consider over their verdict at 9:45 on Friday night, February 26th, and at 1 A. M. Saturday morning, February 27th, the jury retired into court and asked that the court re-read to them his instructions upon the question of intent and they thereupon retired to the jury room and stayed in continuous session all night long, without succor or sleep until about 7 A.M., when they were taken to breakfast, and then returned to the jury room and at shortly after 10 o'clock on the morning of Saturday, February 27th, they brought into court a verdict reading substantially as follows: "We, the jury, find the defendants guilty, but most earnestly ask the leniency of the court," which was a compromise verdict and the result of mental and physical exhaustion with the consequent weakened resolution and was found without the knowledge of the grave consequences of such a conclusion.

XII.

The court erred in permitting the Government to offer testimony showing that the defendant, W. G. Simpson, had borrowed from the American National Bank in September, 1913, \$3500.00, because such testimony was highly prejudicial, threw no light upon the issue being tried, and certainly had nothing whatsoever to do with the intent that W. G. Simpson

had in March, 1913, when they issued, if they did issue, and put forth the certificate in question.

XIII.

The court erred in overruling the defendants' motion in arrest of judgment, because such motion specifically attacked the validity of the indictment, the validity of the trial, showed that the defendants had been formerly in jeopardy and formerly acquitted, and that the court had erred in the conduct of the trial and in giving certain instructions to the jury, and in refusing to give certain special instructions of the defendants, all of which more particularly appears from said motion to arrest, which is referred to and made a part of this assignment.

XIV.

The court erred in failing to grant these defendants a new trial for all of the reasons set forth in their amended motion for a new trial, which motion is made a part thereof and in the interest of brevity is not repeated.

XV.

The court erred in refusing to permit the defendants to show all of the account of each of them in the individual ledger of the American National Bank, because the court had permitted the Government to introduce the ledger showing such accounts up to and including the 30th day of July, 1913, since such accounts would have shown the deposit by the defendants of various and sundry sums of money after said date, and the same were admissible upon the question

of good faith and intent and to rebut certain presumptions that were sought to be indulged in from the portions of such accounts introduced by the Government.

XVI.

The court erred in failing to give defendants' specially requested charge No. 1, or the substance thereof, which directed the jury that the venue was a matter of fact that the Government must prove beyond a reasonable doubt and that if the certificate of deposit described in the indictment was not issued and put forth within the jurisdiction of this court, but was issued and put forth in the State of Mississippi, or any where else, or if they had a reasonable doubt upon that question, they should acquit the defendants, because such requested charge is the law.

XVII.

The court erred in that portion of his charge to the jury wherein he instructed the jury in substance, that even though the defendant, S. D. Simpson, had issued hundreds of certificates of deposit without any authority of the directors, other than by implication, that such implied authority would not protect him in the issuance of the certificate in question for the reason that no money or its equivalent had been deposited with the Bank at the time of such issuance, because the statute does not require that the funds or their equivalent be deposited with the Bank at the time the certificate is issued, nor prior thereto,

nor simultaneous therewith, nor thereafter, and there was no reason why the said implied authority to issue could not have been acted on in good faith by the defendant, S. D. Simpson, with reference to the certificate in question, as with any other certificate, or at any rate, this issue should have been left, as a matter of fact, to the jury for its determination.

XVIII.

The court erred in failing to give defendants' specially requested charge No. 2, or the substance thereof, and particularly that part thereof, which instructed the jury that the practice of the defendant, S. D. Simpson to issue certificates of deposit without first consulting the directors, of which practice the directors well knew, and the fact that the directors ratified the issuance of this certificate when first they saw it, would, in law, constitute such an authority to issue as the statute demanded and, therefore, the defendants should have been acquitted, because such instruction embraced the law with reference to the undisputed facts.

XIX.

The court erred in failing to give defendants' requested instruction No. 3, wherein it was requested that the jury be told that if, as a matter of fact, they found that the certificate was not dated, nor made payable to anyone, nor filled in for any amount, nor bearing any maturity, when the same left the State of Idaho, then and in that event, they should acquit, for the reason that a commercial instrument is not

legally complete without date, amount, payee, and maturity stated therein and there can be no agency legally constituted that may supply such information if the principal is in ignorance as to such information and, further, because there was no charge of conspiracy made against these defendants, and further because the offense was not committed in Idaho.

XX.

The court erred in failing to give to the jury specially requested charge No. 4, or the substance thereof, wherein the jury was instructed that they should find where the blank in fact became a certificate and if they found that it became a certificate in the State of Mississippi, and was there issued and put forth, they should acquit, because such stated the law.

XXI.

The court erred in failing to give defendants' requested charge No. 15, or the substance thereof, which directed the jury to return a verdict of not guilty, because of the duplicitousness of the indictment in that it attempted to charge four different and distinct offenses by the conjunctive use of the words "injure and defraud", and the conjunctive use of the words "issued and put forth", because the statute makes each and all of such acts a distinct felony.

XXII.

The court erred in failing to give defendants' requested charge No. 14, or the substance thereof,

wherein it was desired that the jury be told that the word "issue" and the words "put forth" as used in the indictment have a special legal meaning, which is, in substance, that the instrument declared upon in the indictment must have been complete at the time it went into the hands of the holder; in other words, it must have been dated, signed, must have carried an amount, a payee and a maturity, because otherwise it would not be a certificate of deposit and, therefore, was never issued or put forth within the meaning of the statute.

XXIII.

The court erred in failing to give defendants' requested charge No. 5, wherein it was asked that the jury be told in substance that any intent that might have originated after the date of the issuing of the certificate with reference to the use of the \$2425.00, would not be the venal intent demanded under the statute and under the indictment before conviction, because the law demands that one's act be measured criminally by the intent existing at the time the act was committed.

XXIV.

The court erred in failing to give the defendants' specially requested charge No. 6, wherein it was asked that the jury be instructed to acquit the defendants since the proof would not establish the allegations in the bill of indictment with reference to the issuing and putting forth of the certificate of deposit in question within the jurisdiction of the

court, nor with the intent to the law demanded, nor without the consent of the directors.

XXV.

The court erred in failing to give defendants' requested charge No. 7, which asked the jury by instruction that they should acquit unless they found that the defendants intended at the date of the issue of the instrument to injury and defraud the Bank, such being the allegation of the indictment.

XXVI.

The court erred in failing to give the defendants' requested charge No. 10, or the substance thereof, wherein it was asked that the jury be told that the statute does not require that money or its equivalent be deposited in a bank, or with a bank, before that bank shall issue a certificate of deposit, nor does the law require that one shall deposit money or its equivalent before a bank shall issue to him a certificate of deposit, because the statute denounces the issuance of a certificate of deposit with the intent to injure or defraud and without the consent of the board of directors and makes no other requirement with reference to the issuance of such instruments.

XXVII.

The court erred in refusing to give defendants' requested charge No. 11, or the substance thereof, wherein it was asked that the jury be told that the statute did not require that the consent of the board of directors should be secured concurrent with the issuance of a certificate of deposit, because under the

wording of the statute, such consent could be given before, at the time of, or after a certificate of deposit was issued and be entirely sufficient.

XXVIII.

The court erred in failing and refusing to give defendants' requested charge No. 12, or the substance thereof, wherein it was sought to have the jury told that the law did not state when the consent of the board of directors should be secured for the issuance of a certificate of deposit, and therefore, if they found that the board of directors, or if they had a reasonable doubt with reference thereto, accepted such certificate on September 27, 1913, accepted it as the debt of the Bank, ratified its original issuing and putting forth and ordered the same paid, with full knowledge of all of the facts with relation thereto, then and in that event, such consent and ratification dated back to the time of its original issuance and constituted a consent within the law, because the statute does not say how such consent shall be given, nor when such consent shall be given, nor does the statute fix any different rule of law than the well-known rule of ratification, which dates back to the time of the doing of an unauthorized act and validities it the same as though the consent had been originally given at the very time the act was performed.

XXIX.

The court erred in failing and refusing to give defendants' requested charge No. 4-A, or the substance thereof, wherein it was sought to have the

jury told that if the defendant, S. D. Simpson, delivered to the defendant, W. G. Simpson, in good faith and without any intent on his part to defraud the Bank, the certificate in question, and that W. G. Simpson disposed of said certificate with the intent of applying the proceeds thereof to the use of the Bank and did send the proceeds thereof in good faith to his co-defendant, S. D. Simpson, for that purpose then and in that event, they should acquit the defendant, W. G. Simpson, because such instruction stated the law.

XXX.

The court erred in refusing to give defendants' requested charge No. 5-A, wherein it was asked that the jury be instructed that if they believed from the evidence that at the time of issuing the certificate the defendants issued the same without any intent to injure or defraud the Bank but intended to use the same as a means of obtaining money to meet the necessities of the Bank, and to turn over to the Bank, but that afterwards, the defendants, or either of them, changed their or his mind and decided to appropriate the proceeds, they could not be convicted because the statute requires that the evil intent exist at the time of the issuing or putting forth of the certificate.

XXXI.

The court erred in instructing the jury to bring in a verdict against the defendants on their plea of former jeopardy and acquittal, because the Govern-

ment had neither traversed nor demurred thereto and further because such action was prejudicial to the defendants' rights, and further because such instruction was given the same jury that had been empaneled to try the issue of the guilt or innocence of the defendants upon the indictment then and there before the court.

Said defendants and each of them, respectfully submit the above and foregoing as their and his assignments of error committed by the court upon the trial of the above entitled and numbered cause and he and they respectfully pray a reversal of the judgment on account of such errors so assigned by him and them.

W. A. STONE,
JAMES H. HAWLEY,
C. H. LINGENFELTER,
W. H. ATWELL,
Attorneys for Defendants.

Endorsed: Filed March 6, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

PETITION FOR WRIT OF ERROR.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

No. 563.

S. D. Simpson and W. G. Simpson, defendants in

the above entitled cause, feeling themselves aggrieved by the verdict of the jury rendered therein on the 27th day of February, A. D. 1915, and the judgment entered thereon on the.....day of March, 1915, come now by their respective attorneys, to-wit: S. D. Simpson by his attorneys, C. H. Lingenfelter and William H. Atwell, and W. G. Simpson by his attorneys, W. A. Stone and James H. Hawley, and petition the court for an order allowing the defendants and each of them jointly to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf provided,

And your petitioners shall ever pray.

C. H. LINGENFELTER,

W. H. ATWELL,

Attorneys for Defendant, S. D. Simpson.

W. A. STONE,

JAMES H. HAWLEY,

Attorneys for Defendant, W. G. Simpson.

Endorsed: Filed March 6, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

APPEAL FOR ORDER FIXING AMOUNT OF
BAIL.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

No. 563.

To the Honorable F. S. Dietrich, Judge Thereof:

Come Now, S. D. Simpson and W. G. Simpson, defendants in the above entitled and numbered cause, by their respective attorneys as hereinafter signed, and respectfully show unto the Court that the writ of error has been granted herein to the United States Circuit Court of Appeals, for the Ninth Circuit, and that citation in error has been duly served and said defendants therefore move the Court to fix the amount of bail to be entered into by each of the defendants, pending the determination of said writ of error.

Respectfully submitted,

W. A. STONE,

JAMES H. HAWLEY,

C. H. LINGENFELTER,

W. H. ATWELL,

Attorneys for Defendants.

Endorsed: Filed March 6, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

ORDER ALLOWING WRIT OF ERROR.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

No. 563.

At a stated term, to-wit, the February term, A. D. 1915, of the District Court of the United States of America, for the Southern Division of the District of Idaho, held at the court room in the City of Boise, on the 23rd day of February, A. D. 1915, and the working days succeeding, present the Honorable F. S. Dietrich, District Judge.

UNITED STATES OF AMERICA,

vs.

S. D. SIMPSON and W. G. SIMPSON.

No. 563.

Upon motion of C. H. Lingenfelter, William H. Atwell, W. A. Stone and James H. Hawley, Esquires, attorneys of record for the above mentioned defendants, and upon filing a petition for writ of error and assignments of error, and bill of exceptions, it is ordered that a writ of error be and the same is hereby allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, and judgment heretofore entered herein, and that the amount of bond on said writ of error be and the same is hereby fixed at the sum of \$5000.00 for each of said defendants.

FRANK S. DIETRICH,
Judge Presiding.

Endorsed: Filed March 6, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

BOND OF W. G. SIMPSON.

UNITED STATES OF AMERICA,

vs.

S. D. SIMPSON an W. G. SIMPSON.

No. 563.

*In the United States District Court of the Southern
Division of the District of Idaho.*

We, W. G. Simpson and the other subscribers hereto, jointly and severally, acknowledge ourselves indebted to the United States of America, in the sum of Five Thousand (\$5000.00) Dollars, lawful money of the United States of America, to be levied on our, and each of our, goods, chattels, lands and tenements, upon this condition:

Whereas, the said W. G. Simpson has sued out a writ of error from the judgment of the United States District Court, for the Southern Division of the District of Idaho, in cause No. 563, in said court, wherein the United States of America are plaintiffs, and the said W. G. Simpson and the said S. D. Simpson are defendants, for a review of the judgment in the United States Circuit Court of Appeals for the Ninth Circuit:

Now, if the said W. G. Simpson shall appear and surrender himself in the District Court of the United States for the Southern Division of the District of Idaho, on and after the filing in said District Court of the mandate of the said United States Circuit Court of Appeals for the Ninth Circuit, and from time to time thereafter as he may be required to

answer any further proceedings and abide by and perform any judgment or order which may be had or rendered therein in this case, and shall abide by and perform any judgment or order which may be rendered in said United States Circuit Court of Appeals for the Ninth Circuit and not depart from said District Court without leave thereof, then this obligation shall be void; otherwise, remain in full force and virtue.

Witness our hands and seals on this the 6th day of March A. D. 1915.

Charles O. Nelson for \$500.00,

Howard E. Stein for \$500.00,

H. J. McGirr, \$500.00,

R. L. McClelland, \$500.00,

J. W. Robinson, \$500.00,

N. W. Hawn, \$500.00,

W. G. Simpson,

Charles Ceaser, \$500.00,

W. H. Puckett, \$500.00,

Chas. W. Mack, \$500.00,

J. S. Springer, \$500.00.

Taken and approved this, the day of March, A. D. 1915, before me,, District Judge.

Taken and approved this, the day of March, A. D. 1915.

.
Clerk United States District for the
District of Idaho.

State of Idaho,
County of Ada,—ss.

Charles O. Nelson, Howard E. Stein, H. J. McGirr, R. L. McClelland, J. W. Robinson, N. W. Hawn, Charles Ceaser, W. H. Puckett and J. S. Springer, whose names are subscribed as sureties to the foregoing undertaking, being severally duly sworn, each for himself, says, that he is a resident and freeholder, within this state and is worth the sum in said undertaking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

H. J. MCGIRR,
R. L. MCCLELLAND,
HOWARD E. STEIN,
CHARLES CEASER,
W. H. PUCKETT,
CHARLES O. NELSON,
J. W. ROBINSON,
N. W. HAWN,
J. S. SPRINGER.

Subscribed and sworn to before me this the 6th day of March, 1915.

CHAS. W. MACK,
Notary Public.

State of Idaho,
County of Ada,—ss.

Chas. W. Mack, whose name is subscribed as a surety to the foregoing undertaking, being duly sworn says, that he is a resident and free-holder within this state and is worth the sum in said under-

taking specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

CHAS. W. MACK.

Subscribed and sworn to before me this 6th day of March, 1915.

GEO. C. WALKER,
Notary Public.

Approved: Dietrich, Judge. March 6, 1915.

Endorsed: Filed March 6, 1915. A. L. Richardson, Clerk By Pearl E. Zanger, Deputy.

BOND OF S. D. SIMPSON.

UNITED STATES OF AMERICA,

vs.

S. D. SIMPSON and W. G. SIMPSON.

No. 563.

*In the United States District Court of the Southern
Division of the District Court of Idaho.*

We, S. D. Simpson, as principal, and C. F. Spencer and A. W. Dobson, as sureties, the subscribers hereto, jointly and severally acknowledge ourselves indebted to the United States of America, in the sum of Five Thousand Dollars (\$5000.00), lawful money of the United States of America, to be levied on our, and each of our, goods, chattels, lands and tenements, upon this condition:

Whereas, the said S. D. Simpson has sued out a writ of error from the judgment of the United States

District Court for the Southern Division of the District of Idaho, in cause No. 563, in said court, wherein, the United States of America is plaintiff, and the said S. D. Simpson together with W. G. Simpson is defendant, for a review of the judgment in the United States Circuit Court of Appeals for the Ninth Circuit, which said judgment, rendered March 6, 1915, imposes upon said Simpson a punishment of five years imprisonment for a violation of the national banking laws;

Now, if the said S. D. Simpson shall appear and surrender himself in the District Court of the United States for the Southern Division of the District of Idaho, on and after the filing in said District Court of the mandate of the said United States Circuit Court of Appeals for the Ninth Circuit, and from time to time thereafter, as he may be required to answer any further proceedings and abide by and perform any judgment or order which may be had or rendered therein in this case, and shall abide by and perform any judgment or order which may be rendered in said United States Circuit Court of Appeals for the Ninth Circuit and not depart from said District Court without leave thereof, then this obligation shall be void; otherwise remain in full force and virtue.

Witness our hands and seals on this the 14th day of April, A. D. 1915.

S. D. SIMPSON, (Seal.)

A. W. DOBSON, (Seal.)

C. F. SPENCER. (Seal.)

Personally appeared before me, the undersigned United States Commissioner for the Southern District of Texas, the above named S. D. Simpson, principal in foregoing bond, who acknowledged to me that he signed, sealed and delivered the foregoing instrument, for the purposes and considerations therein expressed.

Done at Houston, Texas, this 14th day of April, 1915.

A. L. JACKSON,
U. S. Commissioner, Southern District of Texas,
at Houston, Texas.

Personally appeared before me, the undersigned United States Commissioner for the Northern District of Texas, the above named A. W. Dobson, sureties on the foregoing bond, and acknowledged to me that he signed, sealed and delivered the foregoing instrument, for the purposes and considerations therein expressed.

Done at Fort Worth, Texas, this 20th day of April, 1915.

GEO. W. MITCHELL,
U. S. Commissioner, Northern District of Texas,
at Ft. Worth, Texas.

Personally appeared before me, the undersigned County Clerk in and for Montague County, Texas, and above named C. F. Spencer, surety on the foregoing bond, and acknowledged to me that he signed, sealed and delivered the foregoing instrument for the purposes and considerations therein expressed.

Done at Montague, Texas, this 23rd day of April, 1915.

I. L. CHAUDLER,
County Clerk, Montague County, Texas.

United States of America,
Northern District of Texas.

I, Geo. W. Mitchell, United States Commissioner for the Northern District of Texas, do hereby certify that in my opinion C. F. Spencer and A. W. Dobson, sureties upon the annexed bond of S. D. Simpson, in the sum of \$5,000.00, in the case of the United States of America vs. S. D. Simpson, pending in the United States District Court for the Southern Division of the District of Idaho, No. 563, are good for the amount of the said bond, and if said bond were presented to me for approval, I would approve the same.

Given under my hand and seal of office this 26th day of April, 1915.

GEO. W. MITCHELL,
United States Commissioner, Northern District of
Texas.

United States of America,
Northern District of Texas,—ss.

C. F. Spencer, a surety on the annexed recognizance, being duly sworn, deposes and says that he resides at Montague, in the County of Montague, Texas, in said District, that he is a free-holder in the County of Montague, Texas, that he is worth the sum of Four Thousand Dollars, over and above all his just debts and liabilities, in property subject to

execution and sale, and that his property consists of stone business building and lot at S. W. corner public square; and stone business building and lot at N. W. Corner square in Montague, Texas, Vendor's lien notes on Montague County farm property, and \$1,000 in cattle, horses and mules, in Stevens Co., Okla.

(Affiant's signature) C. F. SPENCER.

Sworn to and subscribed before me this 4th day of March, A. D. 1915.

GEO. W. MITCHELL,
United States Commissioner for said Northern
District of Texas.

United States of America,
Northern District of Texas,—ss.

A. W. Dobson, a surety on the annexed recognizance, being duly sworn, deposes and says that he resides at Fort Worth, in the County of Tarrant, Texas, in said District, that he is a freeholder in the County of Tarrant, Texas, that he is worth the sum of Ten Thousand Dollars, over and above all his just debts and liabilities, in property subject to execution and sale, and that his property consists of 1,000 acres of land in Margaret Carrol survey, Lavacca County, Texas.

(Affiant's signature) A. W. DOBSON,

Sworn to and subscribed before me, this 4th day of March, A. D. 1915.

GEO. W. MITCHELL,
United States Commissioner for said Northern
District of Texas.

Approved: Dietrich, Judge. April 30, 1915.

Endorsed: Filed April 30, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

PRAECIPE FOR RECORD.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

No. 563.

*To the Clerk of the United States District Court for
said Division and District:*

You are hereby requested to make the record in the above styled and numbered cause to consist of the following parts of said record, for transmission to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

1. Indictment.
2. Plea of former jeopardy and Government Replication.
3. Demurrers and motion to quash indictment.
4. Hearing and verdict.
5. Motion for new trial.
6. Sentence.
7. Bill of exceptions.
8. Assignments of errors.
9. Petition for writ of error.
10. Application for order fixing amount of bail.

11. Order allowing writ of error.
12. Bail bonds.
13. Writ of error.
14. Citation.
15. Special charge of defendants.

Respectfully,

W. A. STONE,
JAMES H. HAWLEY,
C. H. LINGENFELTER,
W. H. ATWELL,
Attorneys for Defendants.

Endorsed: Filed March 6, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

No. 563.

*The President of the United States of America, to
the Judge of the District Court of the United
States for the Southern Division of the District
of Idaho, Greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between the United States of America, plaintiffs, and S. D. Simpson and W. G. Simpson, defendants, a manifest error

hath happened to the great damage of the said S. D. Simpson and W. G. Simpson as is said and appears by the complaint. We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the court rooms of said Court in the Federal Building, in the City of San Francisco, together with this writ, so that you have the same at the said place, before the Justices aforesaid, on the 5th day of April next, that the record and proceedings aforesaid being inspected, that said Justices of the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 6th day of March, in the year of our Lord, One Thousand Nine Hundred and Fifteen, and of the independence of the United States, the One Hundred and Thirty-ninth.

A. L. RICHARDSON,

Clerk of the District Court of the United States
for the Southern Division of the District of
Idaho.

By Pearl E. Zanger, Deputy Clerk.

The foregoing writ is hereby allowed.

FRANK S. DIETRICH,
Judge of the United States District Court, Idaho
District.

Endorsed: Filed March 6, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

UNITED STATES,

vs.

S. D. SIMPSON and W. G. SIMPSON.

No. 563.

*United States of America to Honorable J. L. Mc-
Clear, their District Attorney for the District of
Idaho, Greeting:*

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco on the 5th day of April, 1915, pursuant to a writ of error, filed in the clerk's office of the District Court of the United States for the Southern Division of the District of Idaho, wherein S. D. Simpson and W. G. Simpson are plaintiffs in error and the United States of America are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness my hand and official seal at Boise, Idaho,
on this, the 6th day of March, A. D. 1915.

FRANK S. DIETRICH,

[Seal]

Judge.

A. L. RICHARDSON,

Clerk of the United States District Court for the
District of Idaho.

By Pearl E. Zanger, Deputy Clerk.

Service is hereby accepted.

J. L. McCLEAR,

United States District Attorney for the District
of Idaho.

Endorsed: Filed March 6, 1915. A. L. Richardson,
Clerk. By Pearl E. Zanger, Deputy.

RETURN TO WRIT OF ERROR.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest:

[Seal]

A. L. RICHARDSON,

Clerk.

CLERK'S CERTIFICATE.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

THE UNITED STATES,

Plaintiff,

vs.

W. G. SIMPSON and S. D. SIMPSON,

Defendants.

Clerk's Certificate.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the above and foregoing transcript of pages numbered from 1 to 178, inclusive, contain true and correct copies of the Indictment, Plea of former jeopardy, Government's Replication to plea of former jeopardy. Demurrers, Motion to quash indictment, Hearing, Verdict, Motion for new trial, Judgment, Bill of Exceptions, Assignments of Error, Petition for Writ of Error, Application for order fixing amount of bail, Order allowing Writ of Error, Bail bonds, Writ of Error, Citation, Special Charges of defendants, Praecipe for Record, Return to Writ of Error and Clerk's Certificate, which together constitute the transcript of the record and return to the annexed Writ of Error.

I further certify that the cost of the record herein amounts to the sum of \$300.00, and that the same has been paid by the appellant.

Witness my hand and the seal of said court this 6th day of May, 1915.

[Seal]

A. L. RICHARDSON,

Clerk.

[Defendant's Motion in Arrest of Judgment.]

*In the District Court of the United States in and
for the District of Idaho, Southern Division.*

Case No. 563.

UNITED STATES

vs.

S. D. SIMPSON and W. G. SIMPSON.

To the Honorable F. S. DIETRICH, Judge thereof:

COME NOW the defendants in the above-styled and numbered cause and file this their motion in arrest of judgment, and pray that no sentence be entered against them, or either of them, upon the verdict of the jury rendered herein in the above-styled and numbered cause on Saturday, February 27th, A. D. 1915, on the following grounds, to wit:

I.

Because the indictment states no offense under the laws of the United States of America.

II.

Because the indictment attempts to state in the same count four separate and distinct offenses, in that it charges that these defendants performed certain acts with the intent to injure the bank therein mentioned and engaged in certain acts with the intent to defraud the bank therein mentioned, and issued a certain certificate therein mentioned and put forth a certain certificate therein mentioned, each and all of which are distinctive felonies under section 5209 of the Revised Statutes of the United States, and the said count and indictment is therefore duplicitous.

III.

Because the Court erred in overruling these defendants' plea of jeopardy heretofore filed herein.

IV.

The Court erred in the trial of the above-styled and numbered cause wherein he refused to permit these defendants to offer testimony by the various directors of the American National Bank of Caldwell, and to give the testimony of themselves to the effect that on September 27th, 1913, when the certificate of deposit in question reached the American National Bank at Caldwell for the first time, that thereupon its issuance was ratified by the board of directors of the said bank and ordered paid.

V.

The Court erred during the trial of the above-styled and numbered cause in refusing to permit these defendants to testify and to offer testimony to the effect that the fund which paid the certificate of deposit in question originated from a note placed in the American National Bank by Director Walters, which said note passed into the loans and discounts and which said loan in fact paid the said certificate, and that the defendant, S. D. Simpson, deeded his home for the securing of said note and that a few days thereafter the defendant, W. G. Simpson, gave his check in settlement of the Walters note, but that the bank continued to and did, in fact, keep the property deeded to it by S. D. Simpson.

VI.

The Court erred in the submission of this cause to the jury in that portion of his charge relating to

the question of venue, in that the jury were instructed as a matter of law that the handing of the blank certificate in question, signed only by the defendant, S. D. Simpson, to the defendant, W. G. Simpson, in the Idaho District, would, as a matter of fact, by the issuance and putting forth of such certificate in the Idaho District regardless of where and when the said certificate was in fact dated and filled in as to payee, amount and maturity, and regardless of and in the face of the testimony that the certificate was, in fact, put forth, issued and transferred within the meaning of the law, in the State of Mississippi to a holder in the State of Kentucky, that there was no allegation made against these defendants in the bill of indictment of having conspired within this District which would admit against the defendant, S. D. Simpson, the subsequent acts of his codefendant, W. G. Simpson, the question of venue being, under the law, vital to jurisdiction and to conviction.

VII.

The Court erred in submitting this cause to the jury in that portion of his charge wherein he instructed the jury that the continuous practice of the defendant, S. D. Simpson, of issuing certificates of deposit without receiving the authority of the board of directors otherwise than by implication, would not apply to, nor could it be considered by the jury the certificate in question for the reason that the same was issued and put forth without having the money or its equivalent first deposited with the bank. Because there is no provision in the law requiring

the deposit of money before a certificate shall be issued, nor even after a certificate shall be issued, and the issuing of a certificate without the depositing of the money or its equivalent is not denounced in the statute as an offense.

VIII.

Because the Court erred in that portion of his charge wherein he instructed the jury that they might convict these defendants if they found that they did the acts charged against them with the intent either to injure or defraud the bank, because the indictment alleged that they had committed the acts therein complained of with the intent to injure and defraud and having charged in the conjunctive, the Government was bounden to prove beyond a reasonable doubt an intent both to injure and defraud and such allegation would not be satisfied by proof of an intent to injure or defraud.

IX.

Because the Court erred in refusing to give to the jury the charges requested by these defendants and each of them, or the substance thereof, as more particularly appears from said charges on file herein and from the court's general charge.

WHEREFORE, defendants pray as heretofore stated.

W. A. STONE and
JAMES H. HAWLEY,
Attorneys for Defendant W. G. Simpson.
C. H. LINGENFELTER and
W. H. ATWELL,
Attorneys for Defendant S. D. Simpson.

UNITED STATES OF AMERICA.

District of Idaho,—ss.

I, A. L. Richardson, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing copy of Defendants' Motion in Arrest of Judgment, in cause No. 563, United States vs. S. D. Simpson and W. G. Simpson, has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof, I have set my hand and affixed the seal of said Court in said District this 10th day of September, 1915.

[Seal]

A. L. RICHARDSON,
Clerk.

By Pearl E. Zanger,
Deputy.

[Ten Cent Internal Revenue Stamp. Canceled 9/10/15. A. L. R.]

[Endorsed]: No. 563. District Court of the United States, District of Idaho, Southern Division. Case No. 563. United States vs. S. D. Simpson et al. Defendants' Motion in Arrest of Judgment. Filed March 1, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy.

No. 2608. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 13, 1915. F. D. Monckton, Clerk.

2

IN THE

United States Circuit Court of Appeals

FOR THE 9TH CIRCUIT.

No. 2608.

W. G. SIMPSON

and

S. D. SIMPSON,

Plaintiffs-in-Error,

vs.

THE UNITED STATES OF AMERICA,

Defendants-in-Error.

ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF
IDAHO, SOUTHERN DIVISION.

BRIEF AND ARGUMENT FOR PLAINTIFFS-IN-
ERROR.

JAS. H. HAWLEY,

of Boise, Idaho,

and

WILLIAM H. ATWELL,

of Dallas, Texas,

Attorneys for

Plaintiffs-in-Error.

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IN THE
United States Circuit Court of Appeals
FOR THE 9TH CIRCUIT.

No. 2608.

W. G. SIMPSON

and

S. D. SIMPSON,

Plaintiffs-in-Error,

vs.

THE UNITED STATES OF AMERICA,

Defendants-in-Error.

ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF
IDAHO, SOUTHERN DIVISION.

**BRIEF AND ARGUMENT FOR PLAINTIFFS-IN-
ERROR.**

Explanation.	|	The figures in parenthesis indicate
	|	the pages of the printed record.
	|	The Plaintiffs-in-Error for conveni-
	|	ence will be referred to as "the de-
	|	fendants."

STATEMENT OF NATURE AND RESULT OF CASE.

The defendants, W. G. Simpson and S. D. Simpson,

were indicted on February 13th, 1915, for an alleged violation of the National Banking Act. It was charged in the indictment that on or about the 27th day of March, 1913, S. D. Simpson, being the cashier of the American National Bank of Caldwell, Idaho, issued and put forth a \$2,500 certificate of deposit without the authority of the Board of Directors and with the intent to injure and defraud the Association. That such certificate certified that there had been deposited by the defendant, W. G. Simpson, the sum of \$2,500, but that the said W. G. Simpson did not, at the time the certificate was issued and put forth by the said S. D. Simpson, have on deposit with said National Bank the amount of money equal to the amount specified in said certificate, nor any amount or sum of money whatsoever.

The indictment further charged that the defendant, W. G. Simpson, aided and abetted S. D. Simpson with the intent to injure and defraud the Association in issuing and putting forth the said certificate without the authority of the Board of Directors.

The case came on for trial at the February term of the United States District Court for the Southern Division of the District of Idaho. In appropriate order the defendants filed their plea of jeopardy upon which the court ordered the jury to find for the Government, they filed their demurrers and motion to quash, which were overruled, and then entered their pleas of not guilty.

On Saturday, February 27th, a verdict of guilty was returned against both defendants embodying an earnest recommendation for the leniency of the court and on March 6th, after their motions in arrest of judgment

and for new trial had been overruled, they were sentenced to five years each in the penitentiary at McNeil Island.

Seasonably a writ of error was granted and perfected.

DEFENDANTS' ASSIGNMENTS OF ERROR.

I.

The court erred in overruling the defendants' plea of jeopardy and former acquittal.

II.

The court erred in overruling the defendants' demurrers and motion to quash the indictment herein.

III.

The court erred in refusing to permit the defendants to prove by themselves and the board of directors of the American National Bank of Caldwell, that the issuance of the certificate of deposit in question was ratified by the board of directors as soon as they knew it had been issued and arranged for its payment by the discounting of Director Walters' note.

IV.

The court erred in refusing to permit the defendants to show by the defendant, S. D. Simpson, that he, the said defendant, S. D. Simpson, executed a warranty deed to his home, which was of greater market value than the certificate in question, which property, after the retirement of the Walters' note by the complete payment thereof, by the defendant, W. G. Simpson, was retained by the bank and has never been returned to the defendant, S. D. Simpson, such testimony bearing directly upon the question of intent and being admis-

sible after the Government had been permitted to prove the entire transaction from March to September 27th, inclusive.

V.

The court erred in that portion of his general charge to the jury wherein he instructed the jury that the phrase and words, "issued and put forth," as used in the bill of indictment, were fully satisfied by the placing of the blank certificate of deposit in question in the hands of the defendant, W. G. Simpson, by the defendant, S. D. Simpson, in the State of Idaho, even though such blank certificate did not, in fact, contain either date, name of payee, amount, or maturity, and even though such certificate did not, in fact, pass out of the hands of W. G. Simpson until a much later date and in a different state, to-wit, the State of Mississippi, where the date and name of payee and amount and maturity were put therein by the defendant, W. G. Simpson, without the knowledge of the defendant, S. D. Simpson, and thereupon negotiated to an innocent holder in the State of Kentucky, because such instruction permitted the jury to convict these defendants for an offense committed beyond the jurisdiction of this Court. This matter was called to the attention of the court by special instructions..

VI.

The court erred in instructing the jury that they might convict the defendants, either or both of them, if they believed beyond a reasonable doubt that the defendants, or either of them had, without the consent of the board of directors, etc., issued the certificate in question with the intent to injure or defraud, because

the indictment charged such intent to be in the conjunctive, to-wit: that such issuing and putting forth, etc., was done with the intent to injure and defraud.

VII.

The court erred in charging the jury that the intent required by the statute and charged in the indictment could be presumed and the jury would be authorized in presuming it from the spending and use of the \$2,425, which the defendant, W. G. Simpson, had realized upon his own note attached to which was a certificate of deposit which he had made from a blank given him by S. D. Simpson, because any intent that might have been in the minds of the defendants at the time they were using such \$2,425 would not meet the measure of the law or the allegations of the indictment, unless such intent had also existed at the time the certificate in question had been issued and put forth, even though such subsequent use might, in reality, constitute another sort of an offense against the National Banking Law.

VIII.

The court erred in overruling the defendants' plea of jeopardy and former acquittal, because at the trial of this case at the September, 1914, term, a jury was empaneled, the defendants entered their plea, witnesses were sworn, testimony was taken and the arguments of counsel were had, all of which occupied more than three days of the court's time, at the end of which time the defendants asked for an instructed verdict on the ground that the indictment did not allege that the certificate was put forth without the consent of the board of directors, whereupon the court, of his own motion, dis-

charged the jury, over the protest and exception of the defendants, because even though such indictment may not have contained a clause sufficient to have made it correct for the unlawful issue of a certificate of deposit, the same did, in fact, charge an offense under the National Banking Laws, to-wit: that of misapplication.

IX.

The court erred in overruling the defendants' demurrer and motion to quash the bill of indictment, because said indictment is, in fact, duplicitous in that it attempts to charge more than one offense in the same count, to-wit: the commission of an act to injure the bank, the commission of an act to defraud the bank, the issuing of a certificate of deposit, and the putting forth of a certificate of deposit, four separate and distinct felonies.

X.

The court erred in overruling the defendants' demurrer and motion to quash the indictment, because the said indictment states no offense against the laws of the United States, in that the facts therein attempted to be alleged, might be entirely innocent, because the statute does not require that one shall have on deposit with a bank that issues to him a certificate of deposit, the sum of money therein specified, nor any part of it.

XI.

The court erred in refusing to permit the defendants' counsel to advise the jury in their argument that a conviction of the defendants would mean a penitentiary sentence, because the jury retired to consider over their verdict at 9:45 on Friday night, February 26th, and at

1 o'clock a.m., Saturday morning, February 27th, the jury returned into court and asked that the court re-read to them his instructions upon the question of intent, and they thereupon retired to the jury room and stayed in continuous session all night long, without succor or sleep, until about 7 a.m., when they were taken to breakfast and then returned to the jury room and at shortly after 10 o'clock on the morning of Saturday, February 27th, they brought into court a verdict reading substantially as follows: "We, the jury, find the defendants guilty, but most earnestly ask the leniency of the court," which was a compromise verdict and the result of mental and physical exhaustion with the consequent weakened resolution and was found without the knowledge of the grave consequences of such a conclusion.

XII.

The court erred in permitting the Government to offer testimony showing that the defendant, W. G. Simpson, had borrowed from the American National Bank in September, 1913, \$3,500, because such testimony was highly prejudicial, threw no light upon the issue being tried, and certainly had nothing whatever to do with the intent that W. G. Simpson had, in March, 1913, when they issued, if they did issue, and put forth, the certificate in question.

XIII.

The court erred in overruling the defendants' motion in arrest of judgment, because such motion specifically attacked the alidity of the indictment, the validity of the trial, showed that the defendants had been formerly in jeopardy and formerly acquitted, and

that the court had erred in the conduct of the trial, and in giving certain instructions to the jury and in refusing to give certain special instructions of the defendants, all of which more particularly appears from said motion to arrest, which is referred to and made a part of this assignment.

XIV.

The court erred in failing to grant these defendants a new trial for all of the reasons set forth in their amended motion for a new trial, which motion is made a part thereof and in the interest of brevity is not repeated.

XV.

The court erred in refusing to permit the defendants to show all of the account of each of them in the individual ledger of the American National Bank, because the court had permitted the Government to introduce the ledger showing such accounts up to and including the 30th day of July, 1913, since such accounts would have shown the deposit by the defendants of various and sundry sums of money after said date, and the same were admissible upon the question of good faith and intent and to rebut certain presumptions that were sought to be indulged in from the portions of such accounts introduced by the Government.

XVI.

The court erred in failing to give defendants' specially requested charge No. 1, or the substance thereof, which directed the jury that the venue was a matter of fact that the Government must prove beyond a reasonable doubt and that if the certificate of deposit de-

scribed in the indictment was not issued and put forth within the jurisdiction of this court, but was issued and put forth in the State of Mississippi, or anywhere else, or if they had a reasonable doubt upon that question, they should acquit the defendants, because such requested charge is the law.

XVII.

The court erred in that portion of his charge to the jury wherein he instructed the jury in substance, that even though the defendant, S. D. Simpson, had issued hundreds of certificates of deposit without any authority of the directors, other than by implication, that such implied authority would not protect him in the issuance of the certificate in question for the reason that no money or its equivalent had been deposited with the bank at the time of such issuance, because the statute does not require that the funds or their equivalent be deposited with the bank at the time the certificate is issued, nor prior thereto, nor simultaneous therewith, nor thereafter, and there was no reason why the said implied authority to issue could not have been acted on in good faith by the defendant, S. D. Simpson, with reference to the certificate in question, as with any other certificate, or, at any rate, this issue should have been left, as a matter of fact, to the jury for its determination.

XVIII.

The court erred in failing to give defendants' specially requested charge No. 2, or the substance thereof, and particularly that part thereof which instructed the jury that the practice of the defendant, S. D. Simpson,

to issue certificates of deposit without first consulting the directors, of which practice the directors well knew, and the fact that the directors ratified the issuance of this certificate when first they saw it, would, in law, constitute such an authority to issue as the statute demanded and, therefore, the defendants should have been acquitted, because such instruction embraced the law with reference to the undisputed facts.

XIX.

The court erred in failing to give defendants' requested instruction No. 3, wherein it was requested that the jury be told that if, as a matter of fact, they found that the certificate was not dated, nor made payable to anyone, nor filled in for any amount, nor bearing any maturity when the same left the State of Idaho then and in that event they should acquit for the reason that a commercial instrument is not legally complete without date, amount, payee, and maturity stated therein, and there can be no agency legally constituted that may supply such information if the principal is in ignorance as to such information and, further, because there was no charge of conspiracy made against these defendants, and further, because the offense was not committed in Idaho.

XX.

The court erred in failing to give to the jury specially requested charge No. 4, or the substance thereof, wherein the jury was instructed that they should find where the blank in fact became a certificate and if they found that it became a certificate in the State of Mississippi, and was issued and put forth, they should acquit, because such stated the law.

XXI.

The court erred in failing to give defendants' requested charge No. 15, or the substance thereof, which directed the jury to return a verdict of not guilty, because of the duplicitousness of the indictment in that it attempted to charge four different and distinct offenses by the conjunctive use of the words, "injure and defraud," and the conjunctive use of the words, "issued and put forth," because the statute makes each and all of such acts a distinct felony.

XXII.

The court erred in failing to give defendants' requested charge No. 14, or the substance thereof, wherein it was desired that the jury be told that the word "issue" and the words "put forth," as used in the indictment, have a special legal meaning, which is, in substance, that the instrument declared upon in the indictment must have been complete at the time it went into the hands of the holder; in other words, it must have been dated, signed, must have carried an amount, a payee and a maturity, because otherwise it would not be a certificate of deposit and therefore, was never issued or put forth within the meaning of the statute.

XXIII.

The court erred in failing to give defendants' requested charge No. 5, wherein it was asked that the jury be told in substance that any intent that might have originated after the date of the issuing of the certificate with reference to the use of the \$2,425, would not be the venal intent demanded before conviction, because the law demands that one's act be meas-

ured criminally by the intent existing at the time the act was committed.

XXIV.

The court erred in failing to give the defendants' specially requested charge No. 6, wherein it was asked that the jury be instructed to acquit the defendants since the proof would not establish the allegations in the bill of indictment with reference to the issuing and putting forth of the certificate of deposit in question within the jurisdiction of the court, nor with the intent the law demanded, nor without the consent of the directors.

XXV.

The court erred in failing to give defendants' requested charge No. 7, which asked the jury by instruction that they should acquit unless they found that the defendants intended at the date of the issue of the instrument to injure and defraud the bank, such being the allegation of the indictment.

XXVI

The court erred in failing to give the defendants' requested charge No. 10, or the substance thereof, wherein it was asked that the jury be told that the statute does not require that money or its equivalent be deposited in a bank, or with a bank, before that bank shall issue a certificate of deposit, nor does the law require that one shall deposit money or its equivalent before a bank shall issue to him a certificate of deposit, because the statute denounces the issuance of a certificate of deposit with the intent to injure or defraud and without the consent of the board of directors, and

makes no other requirement with reference to the issuance of such instruments.

XXVII.

The court erred in refusing to give defendants' requested charge No. 11, or the substance thereof, wherein it was asked that the jury be told that the statute did not require that the consent of the board of directors should be secured concurrent with the issuance of a certificate of deposit, because under the wording of the statute, such consent could be given before, at the time of, or after a certificate of deposit was issued and be entirely sufficient.

XXVIII.

The court erred in failing and refusing to give defendants' requested charge No. 12, or the substance thereof, wherein it was sought to have the jury told that the law did not state when the consent of the board of directors should be secured for the issuance of a certificate of deposit, and therefore, if they found that the board of directors, or if they had a reasonable doubt with reference thereto, accepted such certificate on September 27, 1913, accepted it as the debt of the bank, ratified its original issuing and putting forth and ordered the same paid, with full knowledge of all the facts with relation thereto, then and in that event, such consent and ratification dated back to the time of its original issuance and constituted a consent within the law, because the statute does not say how such consent shall be given, nor when such consent shall be given, nor does the statute fix any different rule of law than the well-known rule of ratification, which dates back

to the time of the doing of an unauthorized act and validates it the same as though the consent had been originally given at the very time the act was performed.

XXIX.

The court erred in failing and refusing to give defendants' requested charge No. 4-A, or the substance thereof, wherein it was sought to have the jury told that if the defendant, S. D. Simpson, delivered to the defendant, W. G. Simpson, in good faith and without any intent on his part to defraud the bank, the certificate in question, and that W. G. Simpson disposed of said certificate with the intent of applying the proceeds thereof to the uses of the bank and did send the proceeds thereof in good faith to his co-defendant, S. D. Simpson, for that purpose, then and in that event they should acquit the defendant, W. G. Simpson, because such instruction stated the law.

XXX

The court erred in refusing to give defendants' requested charge No. 5-A, wherein it was asked that the jury be instructed that if they believed from the evidence that at the time of issuing the certificate the defendants issued the same without any intent to injure or defraud the bank but intended to use the same as a means of obtaining money to meet the necessities of the bank, and to turn over to the bank, but that afterwards the defendants, or either of them, changed their or his mind and decided to appropriate the proceeds, they could not be convicted, because the statute requires that the evil intent exists at the time of the issuing or putting forth of the certificate.

XXXI.

The court erred in instructing the jury to bring in a verdict against the defendants on their plea of former jeopardy and acquittal, because the Government had neither traversed nor demurred thereto and further because such action was prejudicial to the defendants' rights, and further because such instruction was given the same jury that had been empaneled to try the issue of the guilt or innocence of the defendants upon the indictment then and there before the court.

Said defendants and each of them respectfully submit the above and foregoing as their and his assignments of error committed by the court upon the trial of the above entitled and numbered cause, and he and they respectfully pray a reversal of the judgment on account of such errors so assigned by him and them.

THE DEFENDANTS' FIRST ASSIGNMENT OF
ERROR.

The court erred in overruling the defendants' plea of jeopardy and former acquittal.

STATEMENT.

Also assigned as Eighth Assignment more at length (150).

On the 23rd of February the defendants filed their plea of jeopardy (12-19). In substance such plea alleged that a court with competent jurisdiction had, on the 16th, 17th and 18th days of September, 1914, tried the defendants upon the identical indictment to which they were again asked to plead; that in the United States District Court for the Southern Division of the

District of Idaho they had, on the 16th of September, 1914, entered their plea of "not guilty" to an indictment identical with the one now before the court except that the same did not contain the clause: "Without the authority of the Board of Directors," and thereupon the trial was proceeded with during the 16th, 17th and 18th days of September, the Government offering its witnesses in testimony and closing its case and the defendants closing their case and the Government having offered its argument to the court and jury, and the defendants having offered their argument to the court and jury, when one of the defendants' counsel suggested to the court that the indictment did not contain the clause: "Without the authority of the Board of Directors," and thereupon the court, over the defendants' objection and when the defendants were demanding a verdict at the hands of the jury, discharged the jury, and remanded the defendants, at the request of the District Attorney, to abide the action of the Grand Jury (12-19).

That the indictment upon which the defendants were tried in September, 1914, and which was the basis for their plea of jeopardy, was in the following words and figures and carrying the same docket number as the one upon which they were convicted:

"In the District Court of the United States within and for the District of Idaho, Southern Division.

February Term, 1914.

THE UNITED STATES OF AMERICA,

vs.

S. D. SIMPSON AND W. G. SIMPSON,

Defendants.

INDICTMENT.

Charge—Issuing Certificate of Deposit without authority, Vio. Sec. 5209, R. S. U. S.

The Grand Jurors of the United States of America, being first duly empaneled and sworn, within and for the District of Idaho, in the name and by the authority of the United States of America, upon their oaths, do find and present:

That heretofore, to-wit: on or about the 27th day of March, 1913, at Caldwell in the County of Canyon and State of Idaho, and within the jurisdiction of this Court, one S. D. Simpson being then and there the Cashier of a certain National banking association then and there known and designated as 'The American National Bank of Caldwell,' which said association had been theretofore created and organized under and by virtue of an Act of Congress entitled, 'An act to Provide a National Currency secured by a Pledge of United States Bonds, and to Provide for the Circulation and Redemption thereof,' approved June 3, 1864, and which said association was then and there acting and carrying on a banking business at the city of Caldwell in the said district under the said Act of Congress, and Acts amendatory thereto, and which said association was then and there authorized to lawfully issue and put forth certificates of deposit drawn upon said association, did wilfully, unlawfully and feloniously and with the intent to injure and defraud said association, issue and put forth a certain certificate of deposit drawn upon said association in the sum of \$2,500 therein and thereby certifying that there had been deposited by one W. G. Simpson in and with said association, the said sum of \$2,500, which said certificate of deposit was then and there in words and figures following, to-wit:

‘The Monticello Banking Co.,
Monticello, Ky., 9715
THE AMERICAN NATIONAL BANK 1549
OF CALDWELL.

No. 1991—Int.	\$2,500.00
	62.50

\$2,562.50

Caldwell, Idaho,
March 27, 1913.

CERTIFICATE OF DEPOSIT.

Not subject to check.

W. G. Simpson has deposited in this bank Twenty-Five Hundred and No.-100 Dollars payable to the order of himself in current funds on the return of this Certificate properly endorsed six months after date, with interest at 5 per cent per annum. No interest after maturity.

S. D. SIMPSON, Cashier.

Due Sept. 27th.’

In the center of the face of said certificate of deposit appears a circle with a capital **C** in pad or purple ink, and which said certificate of deposit, after having been so issued and put forth as aforesaid, has been on the back endorsed as follows:

W. G. Simpson. All prior endorsements guaranteed. Pay to the order of any bank or banker Sep. 22, 1913. The Monticello Banking Co., 73-258 Monticello, Ky., **W. L. Baker, Cashier.** 9-22-9715.
92-50. Previous endorsements guaranteed. Pay any bank or banker or order. Sep. 27, 1913. First National Bank, Caldwell, Idaho. **W. P. Lyon, Cashier.**

Pay to the order of First Nat. Bank, all prior endorsements guaranteed. First National Bank of Chicago 2-1 Sep. 24, 1913. 2-H. **A. Howland, Cashier.**

All prior endorsements guaranteed pay to the order of any bank or banker, Sep. 23, 1913. Please report by our No. 3204, National Bank of Kentucky, Louisville, Ky. H. D. Ormsby, Cashier.'

And the Grand Jurors aforesaid, on their oaths aforesaid, do further find and present, that the said W. G. Simpson, to whom said Certificate of Deposit was then and there issued and put forth as aforesaid, did not then and there, to-wit: at the time the said certificate of deposit was so issued and put forth by the said S. D. Simpson, cashier as aforesaid, have on deposit with said National Banking Association, an amount of money then and there equal to the amount then and there specified in said certificate of deposit, to-wit: the amount of \$2,500, nor any amount or sum whatsoever as he, the said S. D. Simpson, then and there well knew, and so the said S. D. Simpson did, at the time aforesaid and in the manner and form aforesaid, wilfully, unlawfully and feloniously, and with the intent to injure and defraud said association, issue and put forth the aforesaid certificate of deposit, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further find and present: That the said W. G. Simpson, late of the city of Caldwell, in the district aforesaid, then and there being the identical person to whom said certificate of deposit was in the manner and form aforesaid issued and put forth heretofore, to-wit: on the day and year last aforesaid at said Caldwell and within the jurisdiction of this court, did then and there wilfully, unlawfully and feloniously, and with the intent aforesaid to injure and defraud the said as-

sociation, aid, abet, incite, counsel and procure the said S. D. Simpson, cashier of said association so as aforesaid, to wilfully, unlawfully and feloniously, and with the intent aforesaid, issue and put forth the said certificate of deposit in manner and form aforesaid to do and commit, he, the said W. G. Simpson, then and there well knowing that he did not have the said sum of \$2,500, or any sum at all on deposit with the said association;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

HARRY KEYSER,

United States Attorney for the District of Idaho.
C. J. SINSEL, Foreman of the Grand Jury of the
United States.

Witnesses examined before the Grand Jury in the
above case—E. M. Henden, Fred Brown, Roy
Brolhier, M. J. Devers.

Indorsed: Filed February 13, 1915. A. L. Richardson, Clerk, by Pearl E. Zanger, Deputy Clerk." (14-19).

The Government filed a replication to the plea, alleging in substance that the question of the insufficiency of the indictment was raised by one of the attorneys for the defendants and that the indictment was quashed and the jury discharged, and that the defendants, nor either of them, were ever tried, convicted or acquitted on a sufficient indictment (19-20). The journal of the court was introduced in testimony and shows that after the trial had progressed for the third day and after all the testimony had been introduced and after argument had been made by both the Government and the defendants, one of the attorneys for the defendants moved the court

for a peremptory instruction to the jury to return a verdict of not guilty, which motion was opposed by the Government's attorneys, and after argument the court ordered that said motion be denied, to which action of the court the defendants excepted and the court ordered the indictment quashed and discharged the jury, over the protest of the defendants (20-21; 101-102).

After the testimony upon this plea was taken and argument was heard, the court instructed the jury to find a verdict thereon in favor of the United States against the defendants, which was accordingly done (55-56; 66-68; 70). The defendants reserved an exception to this procedure (71; 101-102).

AUTHORITIES.

Fifth Amendment U. S. Constitution.

Ball v. United States, 163 U. S. 662.

United States v. Sanges, 144 U. S. 310.

Ex Parte Parks, 93 U. S. 18.

2 Bishop New Criminal Procedure, 773.

ARGUMENT.

The Fifth Amendment to the Constitution of the United States declares: "Nor shall any person be subject to be twice put in jeopardy of life or limb." The Supreme Court in the Ball case says that such prohibition is not against being twice punished but against being twice put in jeopardy and the accused, whether convicted or acquitted, is clearly put in jeopardy at the first trial.

In that same case the following language is used:

"But although the indictment was fatally defective but if the court had jurisdiction of the cause and of the party its judgment is not void, but

only voidable by writ of error; and unless so avoided, cannot be collaterally impeached. But if the judgment is upon a verdict of guilty and unreversed, it stands good and warrants punishment of the defendant accordingly and he cannot be discharged by a writ of habeas corpus. If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed and the Government cannot. But the fact that the judgment of the court having jurisdiction of the case is practically final, affords no reason for allowing its validity and conclusiveness to be impugned in another case.’’

It will be remembered that in the Ball case the indictment was fatally defective in that it failed to show proper venue and death of the deceased within the common law period of a year and a day.

The defendants in the case at bar suffered all the expense and hazard of a three-days’ trial in a court of competent jurisdiction and were then denied the right of a verdict. Such trial and hazard and denial were had upon an indictment identical in language and terms and number with the one upon which they were convicted six months later save and except that the words “authority of the Board of Directors” were not therein. It is true that Sec. 5209, under which the prosecutions were had seems to only penalize the issuance of such certificates as are issued without the consent of the directors but, as said by some of the learned judges discussing the question of jeopardy, it is entirely possible that such an indictment is good since it may state some other offense of Sec. 5209 or since such a slight imperfection may not have been noticed by the

defendants, or by their attorneys, or by the court, in which event had they been convicted, they would have suffered and therefore the humane courts hold that such liability is jeopardy. The record in this case shows that the absence of the clause mentioned had for many months escaped the attention of the Government's prosecuting officer and had escaped the attention of the presiding judge during all the time that the cause was on trial.

Bishop, in his new work on Criminal Procedure, Vol. 2, pages 773-774, announces in substance that when the trial panel is full and sworn and the clerk of the court directs the jury to look on the prisoner and hearken to their evidence and when he states to them the substance of the indictment, the plea and their duty to find the defendant guilty or not guilty, the jeopardy of our constitutional law has begun. The prosecuting officer cannot now deny that he is ready and there can be no non-suit, as in a civil case. If a conviction cannot be had, the prisoner is entitled to an acquittal by verdict. The court in the instant case practically entered a non-suit so the Government could amend and start all over.

THE DEFENDANTS' NINTH ASSIGNMENT OF ERROR.

The court erred in overruling the defendants' demurrer and motion to quash the bill of indictment because said indictment is in fact duplicitous in that it attempts to charge more than one offense in the same count, to-wit: the commission of an act to injure the bank, the commission of an act to defraud the bank, the issuing of a certificate of deposit and the putting forth

of a certificate of deposit—four separate and distinct felonies.

STATEMENT.

This assignment (151) is also assigned as Second Assignment (148).

The defendants filed, on February 23rd, 1915, before their plea of jeopardy, their demurrers and motion to quash, which included the following grounds:

(a) The duplicity of the indictment because it charged that the acts were done with the intent to “injure” **and** with the intent to “defraud,” and it is charged that the defendants had “issued” and “put forth” the certificate in question; that is to say, it attempts to charge the doing of an act with “intent to defraud” and the doing of an act with the “intent to injure” and the issuing of the certificate and the putting forth of the certificate, each of which is, if properly plead, a distinct felony and a distinct offense under Sec. 5209.

(b) That the indictment stated no offense known to the law because it alleged the issuing of the certificate of deposit in question when W. G. Simpson “**did not have on deposit with the said bank the sum of \$2,500, or any amount or sum whatsoever**” (21-24), such motion in its entirety being as follows:

“I.

“Come now the defendants and show to the court that the indictment in the above styled and numbered case states no offense known to the laws of the United States of America. Wherefore, they pray judgment.

II.

Further demurring and moving to quash the above styled and numbered indictment, the defendants and each of them plead that the same is duplicitous in that it charges four separate and distinct offenses; (1) it charges these defendants with having issued and put forth a certificate of deposit with intent to injure the National Banking Association therein mentioned, and (2) it attempts to charge these defendants with having issued the certificate of deposit herein mentioned with intent to defraud the National Banking Association therein mentioned; (3) it attempts to charge these defendants with having issued the certificate of deposit therein mentioned, and (4) it further attempts to charge these defendants with having put forth the certificate of deposit therein mentioned. Thus it attempts to charge the doing of an act with intent to injure; the doing of an act with intent to defraud; the issuing of a certificate of deposit and the putting forth of a certificate of deposit, each of which acts is, if properly pleaded, a distinct offense under Section 5209.

III.

The said indictment is further defective and subject to demurrer and motion to quash, both of which suggestions and motions are here now made, because the same attempts to plead and does plead a state of facts which do not constitute a violation of that portion of Section 5209 which makes it criminal to issue a certificate of deposit under the conditions therein inhibited; such facts being the pleading of what appears to be testimony which, if true, does not constitute a violation of Section 5209. In other words, the statute does not denounce as criminal the issuance of a certificate of deposit without the authority of the board of directors, and

such allegations are therefore impertinent and do not allege facts constituting an offense.

Further for other demurrers and objections to said bill of indictment and reasons for quashing the same and holding the same for naught, these defendants show that the said bill is uncertain, vague and indefinite and does not sufficiently apprise them of the charge sought to be made against them, in that in one portion thereof it is alleged and averred that a certificate of deposit was issued and put forth wherein it was certified that there had been deposited by one W. G. Simpson in and with said Association the sum of \$2,500 and in another portion thereof it is alleged and averred that at the time said certificate of deposit was so issued and put forth the said W. G. Simpson did not have on deposit with the said National Banking Association the said sum of \$2,500, or any amount or sum whatsoever, and there is no statement or allegation or averment that the said W. G. Simpson had not in fact deposited \$2,500 in said bank to the credit of said bank, or paid over to said bank the said sum of money. In other words, the allegations made in the bill of indictment might be thoroughly consistent with the legal issuing of said certificate of deposit and the allegations and averments in said indictment in said regard are not inconsistent with the innocence of the defendants, and each and both of them.

Said indictment is further vague, inconsistent, and does not give these defendants sufficiently to understand the charge made against them, in that it is alleged in said bill of indictment that said National Banking Association and its board of directors were authorized to issue and put forth certificates of deposit drawn upon said Association, and then proceeds to set forth an alleged state of facts

which would show the drawing of the certificate therein describel by the said Association.

Wherefore defendants pray that they go hence without day."

Said motion and demurrer were overruled, to which action of the court the defendants excepted (53; 65-66).

The indictment charges: "And with the intent to injure **and** defraud said Association" (8); and again it contains the words: "And with intent to injure and defraud said Association" (10); and again it charges, "And with intent to injure **and** defraud the said Association" (11). In other words, it always uses the conjunctive between the words "injure and defraud." Nowhere in the indictment does it use the disjunctive "or" between these words as it is used in the statute.

AUTHORITIES.

U. S. R. S. 5209.

U. S. v. Norton, 188 Fed. 259.

Billingsley v. U. S. 178 Fed. 659.

1 Bishop's New Criminal Procedure, 353.

U. S. v. Corbett, 215 U. S. 233.

Lew Allen v. U. S. 223, Fed. 18.

ARGUMENT.

Duplicity in criminal pleading is the joinder of two or more distinct offenses in one count. When an indictment is subject to such criticism it will be quashed on motion, or it may be demurred to or the prosecutor may be put to his election on which charge to proceed (Bishop's New Criminal Procedure, Vol. 1, page 361,

with authorities therein cited). Such objections must be raised before trial and they are too late after verdict (*Morgan v. U. S.* 148 Fed. 189). If, therefore, there is anything in the contention of the defendants, they made such contention seasonably by appropriate motions and demurrers.

Section 5209 denounces embezzlement, abstractions, or misapplications. It also denounces the issuing or putting in circulation any notes of the Association. It also denounces the issuing or putting forth of a certificate of deposit. It also denounces the making of a false entry in a book or report or a statement of the Association, and then adds the words, "**In either case,**" to injure or defraud the Association, etc., or to deceive any agent, etc. Manifestly the statute creates, because there were no such offenses before, at least nine distinct felonies.

Is it an offense to issue a certificate of deposit without the authority of the directors with the intent to injure the bank? Is it an offense to issue a certificate of deposit without the consent of the directors with the intent to defraud the bank? Certainly.

We cannot assume that Congress, in the use of the words, "Injure and defraud," in the phrase "Injure or defraud" intended to use synonyms because we know that there are many ways that a bank could be injured by some of the officers enumerated in the statute under discussion, without being defrauded of a penny and that Congress had in mind the remedying and prevention is evident from the latter part of the statute, which clearly creates a felony out of the act of making a false entry for the purpose of deceiving the treasury officials

without the slightest danger of defrauding or without the slightest attempt to defraud.

If, then, there were and are two different intents, viz: an intent to injure and an intent to defraud, then and in that event the indictment is clearly duplicitous because it charges that the acts were done with both intents, and there is no offense created by the statute without the venal intent therein mentioned. In other words, no act is an offense unless it have the bad intent that the statute couples with that particular act.

Judge Campbell, in the case of the United States v. Norton, 188 Fed. 259, uses this language:

“It is therefore seen that there are nine distinct acts, each of which, when coupled with the intent to injure or defraud, or with the intent to deceive, mentioned in the statute, becomes a separate and distinct offense. The making of a false entry is not in itself what the statute condemns; but it is the making of it with any one of the several intents mentioned therein. The gravamen of the offense is not the mere making of the false entry; but coupled with the act there must be one of the intents condemned by the statute. A false entry made by mistake, or one knowingly made, but with no intent to injure, defraud, or deceive in any of the respects condemned by the statute, would not be an offense against the statute. ‘A statute will not generally make an act criminal, however broad may be its language, unless the offender’s intent concurred with his act, because the common law does not.’ Bishop on Stat. Crimes, Sec. 132. As, therefore, it is not every false entry, even when knowingly made, but only such as is concurrent with some particular intent named in the statute,

which is condemned, it may, I think, be properly said that the criminal intent is the gravamen of each offense contemplated by section 5209. *Evans v. United States*, 153 U. S. 11c. cit. 594; 14 Sup. Ct. 934; 38 L. Ed. 830."

To the same effect is the reasoning of the United States Circuit Court of Appeals for the Eighth Circuit. In *Billingsley v. the United States*, 178 Fed. 655:

"There are apparently two separate intents contemplated by this section, either of which, when accompanying a forbidden act constitutes an offense. One of them is the intent "to injure or defraud" and the other the intent "to deceive." The contention that there can be no offense in making a false entry with the intent to deceive an agent appointed to examine the affairs of the association unless there be also the co-existing intent to injure or defraud the association, etc., seems to ignore the grammatical structure of the statute and the natural meaning of the language employed. Either the intent to injure or defraud or the intent to deceive, when accompanying the doing of the substantive act to which they appropriately pertain seem, according to the language employed, to constitute an offense. . Any other construction would, in our opinion, give practical immunity to the making of a false entry with the intent to deceive, etc."

The verbiage of the statute itself seems to warrant the construction that we now contend for and that has been given by the two courts above mentioned when the phrase "in either case" was used. In other words, Congress seemed to have in mind that there were being a number of new offenses and felonies created.

If we are correct in this, our motion to quash and

our demurrers should have been sustained because it is an elementary rule of pleading that an indictment must not in the same count charge the defendant with two or more distinct and separate offenses and in case it does so, it is bad for duplicity if the offenses are inherently repugnant or are different stages in one transaction, or involve different punishments (22 Cyc. 376, and cases there cited).

It follows, then, says Judge Campbell in the Norton case, that an indictment which in one or the same count charges an officer or agent of the bank with embezzling **or** abstracting its funds, or with abstracting **and** misapplying its funds, or with embezzling its funds **and** making a false entry in a book or report, or combining in the same count the charge of the doing of two or more of the nine distinct acts mentioned, would clearly be duplicitous, and, on a proper and timely objection, would have to be quashed.

But in the indictment now under consideration there is but the issuing of a single certificate of deposit without the authority of the directors. This act, however, as we have seen, is not condemned by the statute except it be coupled with the concurrent intent **either** to injure **or** defraud in the respect mentioned in the statute. The pleader, therefore, must charge **not only the act but the intent**. In this case, he charges that the act was done **both** with the intent to injure and with the intent to defraud, either one of which intents, coupled concurrently with the act, makes that act an offense, and thus two separate and distinct offenses are joined in the same count and such count is, therefore, duplicitous.

Again, the defendants contend that the indictment is fatally defective and was subject to their demurrers and motion for the reason that the indictment alleged that the certificate in question was issued to W. G. Simpson when he, the said W. G. Simpson: **"Did not then and there have on deposit with the said bank an amount of money equal to the amount of the said certificate, or any amount or any sum of money whatsoever"** (10-11). It is entirely immaterial whether one to whom a certificate of deposit is issued has the money on deposit or not. Neither the statute nor any other law contains any requirement of that sort. The certificate itself does not allege that the one to whom it is issued has on deposit the sum therein named, or any other sum. One might have paid for a certificate of deposit or might have deposited to the credit of the issuing bank the amount and yet himself have no deposit whatsoever with the bank. The statute merely creates the offense of issuing a certificate of deposit when it is so issued without the consent of the board of directors and with the intent to injure **or** defraud the issuing bank. Such indictment, therefore, states no offense known to the law, pleads inconsistently and is duplicitous.

DEFENDANTS' THIRD ASSIGNMENT OF ERROR.

The court erred in refusing to permit the defendants to prove by themselves and the board of directors of the American National Bank of Caldwell that the issuance of the certificate of deposit in question was ratified by the board of directors as soon as they knew it had been issued and arranged for its payment by the discounting of Director Walters' note.

STATEMENT.

The defendants offered to prove by themselves and by the directors of the American National Bank that on September 27, 1913, the certificate of deposit in question came into the bank for payment; that the directors, with knowledge of the facts as to its original issuance—that is, that it was issued without the bank having received the money therefor, ratified its issuance and ordered its payment, one of the directors giving his note which passed into the loans and discounts of the bank, for the amount necessary and the defendant, S. D. Simpson, deeded his home to the bank, which was worth much more than the amount in controversy, and within one week's time thereafter the defendant, W. G. Simpson, when he learned of the facts, sent his check for \$2,500 plus, which was duly paid and the entire certificate retired, which testimony the court declined to permit and the defendants then and there duly and seasonably in open court excepted (114-115).

The following also happened in this connection, S. D. Simpson, being on the stand, testified:

Q. By his attorney, Mr. Atwell: "When before the trials in this court, did you see, the first time after you had given blank certificate No. 1991 to your brother, did you see it?

A. September 27th, when it was presented for payment and I paid it.

Q. What did you do with it when you got it?

Mr. Snead, for the Government: We object to what he did with it as immaterial.

A. Mr. Walters took it—

Q. Mr. Snead. We object to going into this matter.

It is the same matter that has been ruled on several times here.

The Court: He can state what he did with it. Do you mean handed it to some one?

A. When it was presented for payment, Your Honor?

Mr. Atwell. What did you do with it when it was presented for payment?

A. I called a meeting of the directors'' (112-115).

Thereupon the tender was made to offer testimony of the defendants and the board of directors showing in substance that on September 27th, when the certificate was returned for payment to the bank the defendant, S. D. Simpson, took it at once to the board of directors who ratified its issuance and ordered its payment and Simpson deeded his home to the bank to guarantee the directors arranging for its payment against loss, and within one week of that time, or by October 1st, the other defendant, W. G. Simpson, had forwarded his check to settle the entire matter, which tender and testimony the court declined, whereupon the defendants duly and seasonably in open court excepted (112-115).

The court will bear in mind in this connection that the defendant, S. D. Simpson, had, according to his and his brother's testimony, turned over to his brother some blank certificates of deposit to which S. D. Simpson had signed his name as cashier, that these blanks were turned over to W. G. Simpson in Caldwell, Idaho, that they did not contain amount, date, name of payee nor maturity (99-101). That this was some time in

March or April, 1913. That the next time the defendant, S. D. Simpson, saw the certificate in question was on September 27th, 1913, when it was presented for payment (102-147).

The defendant, S. D. Simpson, as cashier, issued certificates of deposit during the regular course of business without consulting the directors each time; in other words, they were issued as part of his duties.

The defendant, W. G. Simpson, testified in substance to the above and in addition that these certificates were handed him by his brother for the purpose of raising some money for the bank in some of the Eastern States, where money might be more plentiful and cheaper; that he finally went to Meridian, Mississippi, his then home, and, after corresponding, succeeded in making a \$2,500 loan on his note with the certificate attached as collateral, with Mr. Baker, the cashier of the bank at Lexington, Ky. That he, thereupon, in Meridian, Mississippi, filled in the certificate as to date, amount, maturity and payee, attached it to his note and forwarded it to the Kentucky banker and subsequently forwarded the proceeds thereof to his brother, S. D. Simpson, advising him to place the same to the credit of the bank, but the defendant, S. D. Simpson, placed it to the credit of himself, W. G. Simpson, by error (115-147). Undisputed facts (96, 97, 98).

The record contains a carbon of the letter of transmission (127). The books of the bank show that the amount went to the credit of W. G. Simpson instead of to the credit of the certificate of deposit, as it would have done, if the defendant, S. D. Simpson, had followed the instructions of W. G. Simpson. S. D. Simp-

son says he so deposited it by error. It was held in Kentucky until its maturity, which was the expiration of six months, and it was then forwarded for payment and was received and paid by the Caldwell bank on or about September 27th, when the directors had ratified it and ordered it paid. The bank never lost a penny by the transaction. The entire amount, principal and interest, was paid by the defendants.

The defendants requested that the court charge the jury as shown in Special Charge No. 2 in the following words:

“The charge made against these defendants is that they issued in Canyon County, Southern Division of the District of Idaho, a certain certificate of deposit without the consent of the board of directors. It is in evidence before you that the cashier, S. D. Simpson, one of the defendants herein, was in the habit of issuing certificates of deposit without first consulting the directors of the institution and that the directors knew this. It is further in evidence that when the certificate was received in Caldwell for payment on September 27, 1913, the board of directors of the bank met and ratified its issuance and ordered it paid, and you are therefore instructed that such ratification, as a matter of law, dated back to the time of its issuance and rendered valid its issuance, and you are, therefore, directed to acquit both defendants”
(38-39),

which the court refused to give either in whole or in part or in substance, to which action of the court the defendant duly and seasonably in open court excepted (92).

The court charged the jury that the cashier, by virtue of his official position, has authority to issue a certificate of deposit for moneys actually deposited in the bank (78), "but no such general or implied authority from the board of directors exists in the cashier to issue a certificate of deposit falsely stating that the person to whom it is issued has deposited, or has on deposit, the amount therein stated. In other words, there is no general authority in a cashier to issue a certificate of deposit except in cases where the bank has received the money or its equivalent and the fact that the board of directors may know it to be the practice of the cashier to issue certificates of deposit covering moneys actually received and acquiesced therein, does not imply an assent upon their part to the issuance of a certificate when no money or other thing of value is received. And so in this case the fact that the board of directors may have known of and acquiesced in the practice of issuing certificates where deposits were actually made would constitute no warrant to the cashier to issue the certificate in question without receiving for the bank and to its credit an equivalent in value" (79). Said the court in his charge.

AUTHORITIES.

- Norton v. Shelby, 118 U. S. 425.
 Heyn v. O'Hagen, 26 N. W. 861; 60 Mich. 150.
 Reid v. Field, 1 S. E. 395; 83 Va. 26.
 Ruffner v. Hewitt, 7 W. Va. 585.
 Lorab v. Nissley, 27 Atl. 242.
 Bell v. Borrough, etc., 45 Atl. 930.
 Municipal Security Co. v. Baker Co., 54 Pac. 174.

Storey v. McLay, 13 Pac. 198.

Schuenfeldt v. Junkermann, 20 Fed. 357.

Iowa State Savings Bank v. Block, 59 N. W. 283.

Sims v. the State (Tex.), 87 S. W. 689.

Schagun v. Scott Mfg. Co., 162 Fed. 209.

Allen v. Corn Exchange Bank, 84 N. Y. Sup. 1001.

Larsen v. Thuringia, etc., 70 N. E. 31; 208 Ill. 166.

ARGUMENT.

There is no requirement in the statute as to when the money shall be deposited for a certificate of deposit—whether it shall be simultaneous with its issuing, before its issuing, or after its issuing is conjectural. Whether it shall be deposited at all, is utterly immaterial so far as the statute is concerned. The statute merely makes it an offense to issue a certificate or put forth a certificate without the authority of the board of directors. The directors, therefore, could authorize the issuance of a certificate of deposit when, as a matter of fact, there had been no deposit made.

The testimony offered by the defendants clearly showed ratification. Ratification is the approval of that which was attempted but which was improperly or unauthorizedly performed in the first instance.

The doctrine of ratification proceeds on the theory that there was no previous authority. Ratification when fairly made—that is, when made with knowledge of all the facts, will have the same effect as an original authority. In short, the act is treated there as if it were originally authorized by the principal, for the ratification relates back to the time of the inception of the transaction and has a complete retroactive ef-

fiacy. Ratification is equivalent to antecedent authority. Ratification bears upon the act ratified in the same manner as though the authority of the agent to do the act existed originally.

The case as submitted by the defendants showed a desire upon their part to realize funds for the bank. They were not sure they could do so. They did not know, if they could do so, how much could be realized nor from whom nor when repayment would be desired, nor the date upon which it was to be realized and thereupon the blank certificates were sent out to another State in the hope that a transaction could be consummated and at the earliest possible date after the return of the certificate, and only one of them was negotiated, the board of directors ratified its issuance.

Manifestly if such ratification had the effect that the foregoing authorities maintain it had, such certificate was in fact **issued** within the meaning of the law, "with the authority of the board of directors."

Therefore, the court committed a grave error against the rights of the defendants in refusing to permit them to prove such ratification and in charging the jury as shown, and in refusing the Special Charge along this line submitted by the defendants, or the substance thereof.

DEFENDANTS' FOURTH ASSIGNMENT OF ERROR.

The court erred in refusing to permit the defendants to show by the defendant S. D. Simpson, that he, the defendant S. D. Simpson, executed a warranty deed to his home, which was of a greater market value than the certificate, which home, after the retirement of the

Walters' note by the complete payment thereof by the defendant, W. G. Simpson, was retained by the bank and has never been returned to the defendant, S. D. Simpson, such testimony bearing directly upon the question of intent and being admissible after the Government had been permitted to prove the entire transaction from March to September 27th, inclusive.

STATEMENT.

The defendants offered to prove that when the certificate came in for payment on September 27th, the date it was due, the defendant, S. D. Simpson, took it to the directors and thereupon the directors ordered it paid, and the director Walters gave his note for enough money to pay the same and S. D. Simpson deeded his home to the bank, and a week later W. G. Simpson sent the money to pay the entire matter and take up the Walters note. This testimony was refused (114-115).

AUTHORITIES.

U. S. R. S. 5209.

ARGUMENT.

All of the offenses created by Section 5209 are dependent upon the intent therein demanded. The intent to injure or the intent to defraud is the very soul of the offense. The only way the Government can show an intent is to ask the jury to presume such intent from the facts disclosed surrounding the transaction. Manifestly the same rule applies for the benefit of the defendant. If his original acts are to condemn him, his later or subsequent acts ought to be allowed to explain what originally seemed wrong. The quick pay-

ment, therefore, of a certificate of deposit for which no funds had been placed in the bank is a most compelling act from which to judge the purity or impurity of the original act of issuing.

DEFENDANTS' FIFTH ASSIGNMENT OF ERROR.

The court erred in that portion of his general charge to the jury wherein he instructed the jury that the phrase "issued and put forth," as used in the bill of indictment, was fully satisfied by the placing of the blank certificate of deposit in question in the hands of the defendant, W. G. Simpson, by the defendant, S. D. Simpson, in the city of Idaho, even though such blank certificate did not, in fact, contain either date, name of payee, amount or maturity, and even though such certificate did not, in fact, pass out of the hands of W. G. Simpson until a much later date and in a different State, to-wit: the State of Mississippi, where the date and name of payee and amount and maturity were put therein by the defendant, W. G. Simpson, without the knowledge of the defendant, S. D. Simpson, and thereupon negotiated to an innocent holder in the State of Kentucky, because such instruction permitted the jury to convict these defendants for an offense committed beyond the jurisdiction of the court.

STATEMENT.

The case was being tried in the District Court of Idaho on an indictment which charged that the defendants had committed the transgressions therein complained of in the County of Canyon and State and District of Idaho (7). Each of the defendants testified—and there was no testimony to the contrary—that

the certificate as shown at page 143 of the record which was in the following words:

“At Caldwell, Idaho, March 27th, 1913, No. 1991, W. G. Simpson has deposited in this bank Twenty-five Hundred and no-100 Dollars payable to the order of himself in current funds on the return of this certificate properly endorsed, six months after date, with interest after maturity. S. D. SIMPSON, Cashier. Due Sept. 27”

when handed to W. G. Simpson to be taken with others to Mississippi and other Southern States for negotiation, did not contain the words “March 27, 1913” nor the payee, W. G. Simpson, nor the amount, \$2,500, nor the words, “Six months after date,” nor the words “Due Sept. 27” (143-144). In other words, it was a mere blank piece of paper not dated, not payable to anyone, due at no time and containing no amount (102-144).

After W. G. Simpson reached Meridian, Mississippi, with the blank certificates, after having failed to make any trade in Chicago for the raising of money, he succeeded in making a loan with Baker, cashier of the Monticello, Ky., Banking Company, for a loan of \$2,500 to be made upon his note with a certificate for that amount attached to it as security and he, W. G. Simpson, in the State of Mississippi, on or about April 9th, filled up the blank certificate, dating it, putting the name of the payee therein, the amount and the maturity, and forwarded it to the State of Kentucky, where it was negotiated with Baker and the proceeds therefrom Simpson sent to Caldwell, Idaho, for proper deposit (120-129). Undisputed facts (96, 97, 98).

The other blank certificates were afterwards returned by him, Simpson, to the bank.

The defendants asked the court to charge the jury in an appropriate, properly submitted special charge and at the proper time, as follows:

“You are instructed, gentlemen of the jury, that the pith of the charge in the indictment in this case is the issuing and putting forth of the certificate of deposit therein described without the consent of the board of directors of the bank and with the intent to injure and defraud that bank, and the allegation is made in the indictment that such issuing and putting forth was within the Idaho District and within the Southern Division of said District. This allegation is a matter of fact that must be proven by the Government to your satisfaction beyond a reasonable doubt, and you are therefore charged that if you should find, in accordance with the other instructions herein given you, that the certificate of deposit described in the indictment was not issued and put forth in the Southern Division of the District of Idaho but was issued and put forth in the State of Mississippi, or anywhere else than Southern Division of the District of Idaho, and to-wit: in Canyon County, or if you have a reasonable doubt upon this question, you will find the defendants, and both of them, not guilty” (37-38).

Such special charge the court refused to give, to which action of the court the defendants duly and seasonably in open court excepted (91).

The defendants also requested, at the proper time, on this question of venue Special Charge No. 3 in the following words:

"You are charged as a matter of law, gentlemen, that the certificate in question was not issued or put forth in the legal sense of those two terms in Canyon County, Southern Division of the District of Idaho. If you find, as a matter of fact, that the certificate was not dated nor made payable to anyone, nor for any amount, but was in fact blank save and except that S. D. Simpson had signed the same when it left Canyon County, State of Idaho, it would be your duty to find the defendants and each of them not guilty" (39).

Which charge the court refused to give in whole or in part, to which the defendants duly and seasonably excepted (92).

The defendants also requested in writing their special charge No. 4 in the following words:

"You are instructed, gentlemen of the jury, that if you find as a matter of fact that the certificate set forth in the indictment was actually filled out as to date and amount and maturity and payee and had all of its blanks filled in the State of Mississippi, or if you have any reasonable doubt upon this question, then, and in that event, it would be your duty to find the defendants, and each of them, not guilty; because in such event the certificate would not have been issued and put forth in the Southern Division of the District of Idaho as charged in the bill of indictment" (40).

Which special charge the court refused to give either

in whole or in part, to which the defendants duly reserved exception (92-93).

The defendants also requested at the proper time the following special charge:

"You are instructed, gentlemen of the jury, that the words 'issued and put forth' as used in the indictment in this case and as used in the statute, have a special legal meaning, which is in substance, that the instrument declared upon in this prosecution, must have been complete at the time it went into the hands of the holder. In other words, it must have been dated, signed, must have carried an amount, a payee, and a maturity. In other words, a blank certificate could not have been issued and put forth within the meaning of the indictment and within the meaning of the statute" (36).

Which special charge the court refused to give in whole or in part, to which action of the court the defendants duly reserved exception (93). Refusal to give the special charges also excepted to at proper time (87-88).

Upon this question the court did charge the jury in the following words:

"That is to say, gentlemen, it is quite unimportant whether this certificate was issued in blank or not. If in blank and if S. D. Simpson delivered it to his brother with authority to fill in the blanks and to negotiate it, in the contemplation of law that is the same as if it had been delivered to W. G. Simpson fully filled in with authority to negotiate it" (77),

to which charge the defendants duly and seasonably in

open court before the jury retired, excepted (87-88; 88-89).

AUTHORITIES.

Vander Ploeg v. Van Zunk, 112 N. W. 807; 135 Iowa 350; 13 L. R. A. 490; 124 American St. Rep. 275.

Zimmerman v. Timmerman, 86 N. E. 540; 193 N. Y. 486.

City of Austin v. Nalle, 71 S. W. 414.

Scott v. Abbott, 160 Fed. 573.

Folks v. Yost, 54 Mo. App. 55.

Attorney' General v. Birkbeck, 12 Q. B. D. 605.

Baring v. Inland, etc., 1 Q. B. 90; 23 Cyc. 358; 23 Cyc. 367.

ARGUMENT.

The learned trial judge evidently confused the question of venue and the place of issuing with the question of the responsibility of S. D. Simpson for whatever his co-defendant, W. G. Simpson, did with the blank certificate. Whenever W. G. Simpson filled the blank or negotiated it or issued it or put it forth and in whatever jurisdiction or State these were done, S. D. Simpson was likewise responsible therefor, but until the blank in fact became a complete certificate, payable to somebody at some time in some amount and dated it was never "issued" or "put forth" in the legal sense of these terms. We have found but one case which holds that the date may be put in by the subsequent innocent holder, but that is as far as the authorities permit. In other words, a blank is nothing; it amounts to nothing; it represents nothing. It could not be and was not subject to commercial transactions until it began to live and have a being as to

amount, maturity and payee. "The issue," say the authorities, "of a bill or note is its first delivery, complete in form, to a person who takes it as a holder."

While the court may have refused to accept as proven beyond controversy what the defendants said, he could not, under the law, refuse to submit their defense, nor refuse to submit the issue of venue which was called to his attention by special charges.

The venue is a fact that must be proven by the prosecution to the jury beyond a reasonable doubt as certainly as must any of the charged facts be proven. This prosecution could have been brought in the State of Kentucky where the certificate was actually negotiated, or in the State of Mississippi, but certainly there is no proof whatsoever that a certificate of deposit for \$2,500 payable to the order of W. G. Simpson and due in six months, as alleged in the bill of indictment, was ever issued or put forth in the State of Idaho, as alleged in the indictment. It was, therefore, not only the duty of the court to have submitted this issue to the jury but in the absence of this testimony his duty became clearer and more pronounced—he should have instructed a verdict of not guilty.

In the case of *Zimmerman v. Timmerman*, 86 N. E. 540, cited supra, it is held that a bond is "issued" when it comes into the hands of the holder so executed and delivered as to bind the obligator. The word "issue" is defined in the *Century Dictionary* "to send out, deliver for use, deliver authoratively." The county warrant is not issued unless actually delivered into the hands of the person authorized to receive it, says the

court in *American Bridge Co. v. Wheeler*, 76 Pac. 534. See also *State National Bank v. Board of Commissioners, etc.*, 46 S. 307.

The word "issued" refers to the time of the sale of the bonds or when they passed into the hands of some one who claimed them as a debt against the city. *City of Austin v. Nalle*, 71 S. W. 414.

To argue further with reference to the words "issue or put forth," or with reference to a "blank" being the whole thing, is to return to the hopeless task of proving that twice 2 is 4.

It is quite true that had this issue been submitted to the jury that body might have found against the testimony of the defendants and the only direct testimony in the record in which event they would have had no complaint, but the question here presented is that the issue was fairly raised and that there was no proof of the issuing or putting forth as alleged in the indictment and that such fact was called to the attention of His Honor by several special charges, which were refused, to which action appropriate exception was reserved and that then the court instructed the jury that it was quite immaterial when, in fact, it is vitally material and jurisdictional. The blank piece of paper became a certificate of deposit payable to somebody in some amount at some time in a State other than Idaho.

There can be no questioning of the proposition that fundamental error was committed in this respect.

DEFENDANTS' SIXTH ASSIGNMENT OF ERROR.

The court erred in instructing the jury that they might convict the defendants, either or both of them, if they believed, beyond a reasonable doubt, that the

defendants, or either of them had, without the consent of the board of directors, etc., issued the certificate in question with the intent to injure **or** defraud because the indictment charged such intent to be in the conjunctive, to-wit: that such issuing **and** putting forth, etc., was done with the intent to injure **and** defraud.

STATEMENT.

The indictment uses the conjunctive "and" between the words "injure" and "defraud" wherever and whenever and at each time they are used therein (7-11). The court, in his charge to the jury, though having had the contention of the defendants repeatedly called to his notice by motion to quash and demurrers and by special charges, used in his charge the disjunctive "injure **or** defraud" (76; 79; 80; 82; 83; 84; 84).

To the action of the court in thus charging the jury, notwithstanding the allegations of the indictment, the defendants duly and seasonably in open court and before the jury retired reserved their exceptions (87-88; 90-91).

AUTHORITIES.

U. S. R. S. 5209.

Norton v. United States, 188 Fed. 256.

Billingsley v. United States, 178 Fed. 659.

ARGUMENT.

The indictment charged that the acts done therein were so done with the intent "to injure **and** defraud." The intent is never described in any other language, or phrase, or words, or word. The court evidently recognized that the language of the statute recognized two distinct intents, viz., the intent to injure or the intent

to defraud and made use of the disjunctive in his charge to the jury and thus charged the jury that they might convict if either intent existed, instead of rather than that they must believe that both intents existed before they could convict since it was so charged in the indictment. He uses the following language:

“Fifth, that it was issued with intent to injure OR defraud the bank or its depositors or stockholders” (76).

Again:

“The offense defined by the statute was not complete unless there was at the time an intent to injure OR defraud the bank or some other person” (79).

Again:

“Intent to injure OR defraud the bank is simply a willingness on the part of the defendants, the persons charged, to do an act which is violative of a right of the bank and its depositors or stockholders” (80-81).

Again:

“And you will bear in mind that the charge here is not that the American National Bank was injured or defrauded but that the certificate was issued with the intent to injure OR defraud” (82).

Again, when he began to charge on W. G. Simpson as aider and abettor:

“So as to him you must in addition find, First, that he aided or abetted S. D. Simpson, and Second, that he did so with like intent, that is, with intent to injure OR defraud the bank, or its depositors or stockholders” (84).

Of course it needs no argument to sustain the proposition that the defendants must be tried upon the indictment as drawn and the court's charge must agree therewith and since the indictment charged that the defendants committed the acts with two intents, such intents being different and not synonymous, the measure of the law was unsatisfied and the defendants were deprived of their legal rights when the court authorized the jury repeatedly to convict if they found that either of the intents existed.

In other words, the charge of the court cannot authorize the conviction for any less measure than that carried and alleged in the indictment to which the defendants have plead not guilty.

In addition to the many times already mentioned that this was called to the attention of the court, the defendants, feeling greatly aggrieved, again reserved their exceptions to the charge of the court before the jury retired and in open court but, notwithstanding this, the charge was permitted to stand uncorrected (88).

In view of the fact that the jury remained out all night long and in the small hours of the morning returned to the court and asked to be re-instructed on the question of "intent"—a monumental question in the face of the fact that the certificates were sent out originally for the benefit of the bank and in the face of the fact that the bank had never lost a penny, and in the face of the fact that the issuing of the certificate was ratified by the directors when it did come in, and in the face of the fact that the defendants paid every penny of it at once, principal and interest—such in-

struction and such error is and was most hurtful to the defendants.

DEFENDANTS' TENTH ASSIGNMENT OF ERROR.

The court erred in overruling the defendants' demurrer and motion to quash the indictment because said indictment states no offense against the laws of the United States in that the acts therein attempted to be alleged might be entirely innocent because the statute does not require that one shall have on deposit with a bank that issues to him a certificate of deposit the sum of money therein specified nor any part of it.

STATEMENT.

The indictment charges that the certificate of deposit was issued to W. G. Simpson when he **"Did not then and there, to-wit, at the time the certificate of deposit was so issued and put forth by the said S. D. Simpson, cashier as aforesaid, have on deposit with said National Banking Association an amount of money then and there equal to the amount then and there specified in said certificate of deposit, to-wit: the amount of \$2,500 or any amount or sum of money whatsoever"** (10) And again it charged, **"That he did not have the said sum of \$2,500 or any sum at all on deposit with said Association"** (11).

This was a specific ground of the defendants' motion to quash and demurrers (23-24). The court overruled said motion and demurrers, to which the defendants duly and seasonably excepted (65-66).

AUTHORITIES.

U. S. R. S. 5209.

ARGUMENT.

It is quite unimportant whether one securing a certificate of deposit has any deposit whatsoever with the bank from which he secures such certificate. The statute merely denounces the issuing of a certificate without the consent of the board of directors and with the intent to injure or defraud. Common sense teaches us that certificates may be issued and are issued to persons whether they are depositors or not if one has the money in his hand, or a note which the bank will accept, in his hand, or makes any other arrangement satisfactory to the bank or its officers, such bank or its officers is and are authorized to issue to him a certificate of deposit. He may be an entire stranger to the bank; he may never have done any business with the bank before that time; he may never do any after that with the bank. It is quite immaterial and quite unimportant whether he have a deposit or not.

Hence the indictment alleged a state of facts that showed no offense against the laws of the United States.

DEFENDANTS' THIRTEENTH ASSIGNMENT OF
ERROR.

The court erred in overruling the defendants' motion in arrest of judgment because such motion specifically attacked the validity of the indictment, the validity of the trial, showed that the defendants had been formerly in jeopardy and formerly acquitted and that the court had erred in the conduct of the trial and in giving certain instructions to the jury and in refusing to give certain special instructions of the defendants, all of which more particularly appears from

said motion to arrest which is referred to and made a part of this Assignment.

STATEMENT.

This Assignment (153).

Motion for a new trial, etc. (62).

The motion to arrest and the motion for a new trial the court overruled, to which the defendants duly and seasonably excepted (145-146).

The jury retired at 9:45 p.m. Friday, February 26th to consider of their verdict, where they were held until 1 a.m. Saturday, the 27th, when they requested that the court send them his charge, and thereupon the court had the jury brought into the court room and his charge having been oral and taken down at the time it was given, by the court stenographer, who had not yet transcribed the same and who was not at that hour available, the court asked the jury upon what point they desired to hear the charge and the foreman thereupon arose and said: "We are not satisfied on the question of 'intent,' " and thereupon the court, so far as he could remember, resumed his original charge on the question of 'intent,' save and except he did not restate (such re-statements were not suggested by anyone) to the jury that if they had a reasonable doubt with reference to the intent that they should acquit the defendants, and thereupon the jury were re-taken to their room and, without sleep or succor or accommodation for either, spent the night therein, and at 7 o'clock on Saturday morning, February 27th, were taken to breakfast and immediately retired to the jury room and shortly after 10 o'clock they returned into open

court a verdict of "guilty," attaching to it this recommendation: "We earnestly urge leniency for the defendants." Immediately thereafter the defendants filed their motion for a new trial, alleging that the verdict was the result of mental and physical exhaustion and was a compromise verdict and was reached practically through coercion (95-96).

ARGUMENT.

All of the questions raised in this assignment have heretofore been treated or will hereafter be treated, and argument at this time on the entire record would be mere repetition.

DEFENDANTS' FOURTEENTH ASSIGNMENT OF ERROR.

The court erred in failing to grant these defendants a new trial because the verdict was the result of coercion and of mental and physical exhaustion.

STATEMENT.

This assignment is made up from Assignments Eleven and Fourteen (152; 153). The jury retired Friday night about 9 o'clock to their room to consider their verdict and were not allowed bed or succor; and about 1 o'clock on Saturday morning returned into the court room asking for further instructions on the question of "intent" which the court gave them and they continued to deliberate through all the hours of the night, were taken to breakfast about 7 o'clock Saturday morning, and immediately returned to their jury room, and shortly after 10 o'clock Saturday morning they returned a verdict of "guilty," earnestly urging clemency (95-96).

AUTHORITIES.

Peterson v. United States, 213 Fed. 920.

Suslak v. United States, 213 Fed. 913.

ARGUMENT.

It is not the contention of the defendants here that the court made use of any instructions which would amount to a coercion as defined and denounced by the learned trial judge in this case when he sat with this honorable court and rendered the opinion in the two cases cited above in the 213 Federal, but it is suggested that in the face of the almost technical nature of this prosecution and the insistence of the jury at an early hour of the morning for a re-statement of the instructions as to "intent," that a forced continuation of deliberation through the long hours of the night resulted in some sort of a compromise whereby the defendants were put in jeopardy of a five-years' term in the penitentiary because the jury, in that same verdict, "earnestly" recommended leniency.

It is respectfully submitted that no man or set of men are capable of such clear judgment as should be exercised, when they have gone through hours and days of a tedious trial and are then locked up in a room without food or sleep through the entire night and until the next day is far advanced.

DEFENDANTS' TWELFTH ASSIGNMENT OF
ERROR.

The court erred in permitting the Government to offer testimony showing that the defendant, W. G. Simpson, had borrowed from the American National Bank in September, 1913, \$3,500, because such testimony

was highly prejudicial, threw no light upon the issue being tried, and certainly had nothing whatever to do with the intent that W. G. Simpson had in March, 1913, when they issued, if they did issue, and put forth the certificate in question.

STATEMENT.

The Government was permitted to prove, over the objection of the defendants, that in September and prior to September 27th, 1913, the defendant, W. G. Simpson, had borrowed \$3,500 from the American National Bank. This proof was duly excepted to (143). It had been testified by both the defendants that in August, 1913, S. D. Simpson had ascertained for the first time that the \$2,425 which he had credited to the account of W. G. Simpson had really arisen from the sale of the certificate of deposit. This he ascertained from W. G. Simpson, who was at that time in Caldwell.

ARGUMENT.

The introduction of this testimony upon an entirely immaterial matter was permitted over the defendants' objection and made use of by the Government before the jury to show the utter disregard of the defendants for the indebtedness due by them for the outstanding certificate of deposit. It certainly was no criminal offense to have borrowed the \$3,500 and its borrowing had no connection whatever with what had occurred in March, 1913, and it was only with what had occurred in March, 1913, that the court and jury were legitimately concerned. This testimony was most hurtful and damaging in that it showed that though the defendants both knew, by August, 1913, of the error with refer-

ence to the certificate and the crediting of the amount to W. G. Simpson's account and its use by him, and though W. G. Simpson borrowed \$3,500 in the early days of September, the certificate was in fact not paid until September 27th, notwithstanding the fact that as soon as the certificate did appear on September 27th, it was ratified and paid. The force and effect of this improper testimony cannot be too strongly stressed. The whole atmosphere of the case, the hesitancy, the halting, the recommendation of the jury, clearly show the lack of that mental conviction which ought to be present in the minds of the tryers of men before such men shall suffer the penalty of the law and, therefore, any improper testimony which might have entered into their consideration should be presumed to have been harmful in the absence of a very clear apprehension that it could not have so been.

The admission of this evidence and the complaint that these defendants are now making to the court will receive added force from the fact that the court in his charge to the jury upon the question of intent, the vital part of what was being tried, used the following language:

"If, to illustrate my meaning, the defendants had immediately repaired the wrong before others had knowledge of the existence of the certificate, you might very properly conclude that the restoration to the bank of the value of the certificate at that time tended to corroborate their contention of innocent mistake. Whether you will give such significance to the restoration at a later date when the certificate had come to Caldwell and its existence was known, or must have become known, un-

der all the circumstances of the case, I leave to you to say'' (82-83).

In other words, the court said to the jury in substance, which drew its mind directly to this improper testimony showing that the defendant had secured \$3,500 from the bank the 1st of September: "Now, gentlemen, if Simpson had used that \$3,500 which he got about the 1st of September to pay this certificate, then you might properly consider such payment as tending to corroborate what they have said about being innocently mistaken."

Another injury that this testimony wrought beyond question was that the defendants were continuing to get money out of the bank. In other words, having gotten the \$2,500 certificate, they were not content at that but, about the 1st of September, borrowed another \$3,500 and the fact that this \$3,500 was a loan which, like the \$2,500, was promptly paid at maturity, did not relieve the transaction of the improper sting and improper influence upon the minds of the jury.

DEFENDANTS' TWENTY-THIRD ASSIGNMENT OF ERROR.

The court erred in failing to give the defendants' requested charge No. 5 wherein it was asked that the jury be told in substance that any intent that might have originated after the date of the issuing of the certificate with reference to the use of the \$2,425 would not be the venal intent demanded under the statute and under the indictment before conviction, because the law demands that one's act be measured criminally by the intent existing at the time the act was committed.

STATEMENT.

The amount realized upon the certificate of deposit after it had been filled out in Mississippi by defendant W. G. Simpson and hypothecated as collateral to his note in Kentucky was \$2,425 (123). This money W. G. Simpson sent to the First National Bank of Caldwell by transmitting to that institution his check for that amount drawn on the Southern National Bank of Louisville, where he had deposited the \$2,425 realized (123-124). The check book containing the stub upon which simultaneous entries were made at the time of the drawing of his check was offered in evidence by the defendants as part of the *res gestae*, but such offer was refused by the court, to which action of the court the defendants duly excepted (125-146). The Government had been permitted to prove, over the objection of the defendants, that the defendant W. G. Simpson, had borrowed \$3,500 in the early days of September (143). When W. G. Simpson had secured the \$2,425, he wrote a letter to the American National Bank in which he enclosed a check for that amount, directing that the proper entry be made in the books of the bank to show the issuing of such certificate (127). By some error S. D. Simpson, cashier, placed the \$2,425 to the credit of W. G. Simpson and did not make the entry to the time certificate accounts, and thereafter W. G. Simpson continued to, as he had always done, check upon his account when necessary, and it was in August that the error was discovered (127-128). The defendants, upon this state of facts, requested the following charge in writing at the proper time:

“You are instructed, gentlemen of the jury,

that the only charge against these defendants, or either of them, is the issuing of the certificate of deposit set forth in the indictment without the consent of the board of directors and with intent to injure and defraud the bank, and in coming to your conclusion as to whether or not the Government has established its allegations with respect to this question, beyond a reasonable doubt, you shall not consider the depositing of the \$2,425 to the account of W. G. Simpson, nor the subsequent transactions with relation thereto, for the reason that the intent to injure and defraud as alleged in the indictment and demanded by the law to constitute the acts an offense, is the intent that existed in the minds of the defendants at the time of the issuing and not an intent or determination they formed thereafter; and if you believe or have a reasonable doubt as to whether they had the intent to injure and defraud at the time the certificate was issued and put forth, then it would be your duty to acquit the defendants, and both of them" (41);

which charge was refused, to which action of the court in refusing such charge, or the substance thereof, the defendants duly and seasonably in open court excepted (88).

The court charged:

"If, to illustrate my meaning, the defendants had immediately repaired the wrong before others had knowledge of the existence of the certificate, you might very properly conclude that the restoration to the bank of the value of the certificate at that time tended to corroborate their evidence of innocent mistake" (82).

Again the court charged:

"It is essential to guilt here that a wrongful

intent must have existed at and prior to the time the certificate was hypothecated in Kentucky" (84).

ARGUMENT.

It will thus be seen that the failure of the defendants to pay the certificate in August must have been considered by the jury, under the court's instruction, as leaving the defendants' explanation as to the sending of the blanks for the purpose detailed without any corroboration whatsoever and therefore valueless!

DEFENDANTS' TWENTY-FOURTH ASSIGNMENT OF ERROR.

The court erred in failing to give the defendants' specially requested charge No. 6 wherein it was asked that the jury be instructed to acquit the defendants, since the proof did not establish the allegations in the bill of indictment with reference to the issuing and putting forth of the certificate of deposit in question within the jurisdiction of the court.

STATEMENT.

This Assignment (157).

The defendants requested duly and seasonably the following special charge:

"You will find the defendants not guilty" (42), which the court refused to give, to which action of the court the defendants duly and seasonably excepted (87).

The defendants also requested the following special charge duly and seasonably:

"You are instructed, gentlemen of the jury, to find the defendants not guilty of the charge made against them in the indictment" (29).

The defendants also requested duly and seasonably the following special charge in writing:

“ * * * and the allegation is made in the indictment that such issuing and putting forth was within the Idaho District and within the Southern Division of such District. This allegation is a matter of fact that must be proven by the Government to your satisfaction beyond a reasonable doubt, and you are, therefore, charged that if you should find, in accordance with the other instructions herein given you, that the certificate of deposit described in the indictment was not issued and put forth in the Southern Division of the District of Idaho, but was issued and put forth in the State of Mississippi, or anywhere else than the Southern Division of the District of Idaho, or if you have a reasonable doubt upon this question, you will find the defendants, and both of them, not guilty” (37-38),

which was refused by the court, to which action of the court the defendants duly excepted (87-88).

The court charged the jury that it was quite unimportant whether the certificate was issued in blank or not. If S. D. Simpson delivered the blank certificate to his brother in Idaho with authority to fill it out elsewhere and it was filled out elsewhere, such certificate was issued in Idaho (77), to which the defendants duly excepted (98-99).

There was no direct testimony with reference to the place of issuing or putting forth of the certificate in question save and except that the certificate in question was one of a number of blank certificates that had theretofore been printed for the American National Bank of Caldwell, about 1500 of which had theretofore

been issued. The defendants testified that about March 20, 1913, they, having heard that a large portion of the deposits of the bank were about to be withdrawn by the city of Caldwell so as to give all of the other banks in town a portion thereof, concluded that the president of the bank, who was the defendant, W. G. Simpson, and who was acquainted in Miss. and Ky., with men who were supposed to have money and who was going to that section where he resided, should take with him some of the blank certificates of deposit, upon which the defendant, S. D. Simpson, would sign his name as cashier, for the purpose of securing upon them funds to replace the public deposit that was about to be withdrawn from the bank; that thereupon five certificates without date, amount, maturity or payee written therein but simply being signed: "S. D. Simpson, Cashier," were given to W. G. Simpson for that purpose, and he went to the State of Mississippi from which point; on April 9th, 1913, he succeeded in making a loan of \$2,500 from a bank in Kentucky upon his own personal note for that amount with a certificate of deposit for \$2,500 attached thereto as collateral security, and the defendant, W. G. Simpson, thereupon in Mississippi with a typewriter put the date of March 27th, 1913, in No. 1991 the said certificate, and wrote his own name as payee therein, and he wrote six months as the maturity thereof and made the amount to be \$2,500 and transmitted the same to the innocent holder at Monticello, Kentucky, who discounted the same for \$2,425, which amount he sent to W. G. Simpson, who in turn sent the same to S. D. Simpson, cashier of the bank in Idaho, with a letter instructing S. D. Simpson to credit

the amount to the certificate of deposit account (96-98). The same was deposited by S. D. Simpson to the credit of W. G. Simpson's individual account from which it was checked out by him in the course of business and prior to August 20th, 1913 (98).

ARGUMENT.

The uncontradicted testimony, therefore, shows that the certificate continued to be blank until it reached the State of Mississippi and that it was negotiated in the State of Kentucky and that the proceeds therefor were in good faith sent for the use of the bank as originally planned by the defendants.

Appropriate instructions, therefore, should have given the jury to understand that the use of this money afterward by the continuing to check upon the individual account of himself could not be taken as a circumstance—even a remote one—to shed any light upon such intent as existed in March or April of 1913, unless, also, the jury were allowed to consider the question of payment without any circumscription as to whether such payment was made at the first or second or third opportunity.

DEFENDANTS' TWENTY-EIGHTH ASSIGNMENT OF ERROR.

The court erred in failing and refusing to give the defendants' requested charge No. 12, or the substance thereof, wherein it was sought to have the jury told that the law did not state when the consent of the board of directors should be secured for the issuance of a certificate of deposit, and therefore if they found that the board of directors, or if they had a reasonable

doubt with reference thereto, accepted such certificate on September 27, 1913, accepted it as the debt of the bank, ratified its original issuing and putting forth and ordered the same paid, with full knowledge of all of the facts with relation thereto, then and in that event such consent and ratification dated back to the time of its original issuance and constituted a consent within the law, because the statute does not say how such consent shall be given, nor when such consent shall be given, nor does the statute fix any different rule of law than the well known rule of ratification, which dates back to the time of the doing of an unauthorized act and validates it the same as though the consent had been originally given at the very time the act was performed.

STATEMENT.

The record discloses that there was no direct testimony whatsoever as to when and where the certificate in question was issued save and except the testimony of the defendants and the circumstances of the hypothecation of the certificate with the Kentucky bank which showed beyond cavil that the certificate left the State of Idaho blank as to date, amount, payee and maturity and continued in that condition until it was made a certificate of deposit in Mississippi by W. G. Simpson and hypothecated by him in Kentucky (96-98). The defendants offered to prove by the directors that when the certificate came in on September 27th, 1913 for payment, that being its due date, that the directors ratified its issuance and ordered it paid, which proof the court declined to permit, to which ruling the defendants duly then and there excepted (114-115). At the conclusion of the testimony and at the proper time the

defendants requested the following written special charge to the jury:

"You are charged, gentlemen of the jury, that the law under which these defendants are being prosecuted does not state when the consent of the board of directors shall be secured with reference to the issuance of a certificate of deposit, whether such consent shall be prior to its issuance or after its issuance, nor does it prescribe any particular time for such consent either before or after such issuance and, therefore, if you find that the board of directors of the American National Bank, or have a reasonable doubt with reference thereto, accepted such certificate on September 27, 1913, acknowledged it as the debt of the bank and ratified its original issuing and putting forth and ordered the same paid, with full knowledge of all the facts with relation thereto, then and in that event such consent and ratification would date back to the time of the certificate's original issuance and constitute a consent to such original issuing" (46),

which special charge the court refused to give in whole or in part or the substance thereof, to which refusal the defendants duly and seasonably in open court before the jury retired excepted (87; 94).

In fact the court charged nowhere in even the slightest or remotest degree upon this question of ratification (72-88), and as before stated, refused the testimony offered showing such ratification.

It will further be observed that the court refused to give another special charge requested by the defendant at the appropriate time, to which exception was duly reserved and which is in the following words:

"You are further instructed, gentlemen of the

jury, that the statute under which this indictment is found and under which these defendants are being prosecuted, does not require or demand that the consent of the board of directors of a bank shall be secured concurrent with the issuance of a certificate of deposit" (45).

AUTHORITIES.

Those cited under Third Assignment of Error and also:

- National Bank v. Insurance Co., 103 U. S. 783.
- Insurance Co. v. McCain, 96 U. S. 84.
- Cresswell v. Lanahan, 101 U. S. 347.
- Cook v. Tullis, 18 Wall. 332.
- Boyle v. Zacharie, 6 Pet. 635.
- Clews v. Jamieson, 182 U. S. 461.
- United States v. City Bank, 21 How. 356.
- Pickering v. Lomax, 145 U. S. 310.
- Clark v. Reeder, 158 U. S. 505.
- Supervisor v. Schenck, 5 Wall. 772.
- Jones v. Guaranty, etc., 101 U. S. 622.
- Western National Bank v. Armstrong, 152 U. S. 346.
- Insurance Co. v. Davis, 95 U. S. 425.

ARGUMENT.

The case made by the defendants and which was not disputed by any direct testimony whatever, showed an original good faith act. This case, in theory, bound the court to submit the same to the jury. In other words, the defendants were entitled to have their side affirmatively submitted. Whatever may be said with reference to the ratification of acts that are illegal or immoral or against public policy does not apply to the reasoning here contended for. What they did they

claimed to be for the benefit of the bank and therefore not immoral, or illegal, or against public policy. The defendants assert, may it please the Court, that the entire case made by the Government and the defendants, demanded the admission of the proof and the submission of the special charges, but even if the defendants be mistaken in this position, they were entitled to have this question submitted and the evidence allowed as a fair presentation of their side of the case and in an affirmative manner.

The court will bear in mind, of course, that the record shows that the consent of the directors was not given to Cashier S. D. Simpson each time he issued a certificate of deposit. Such authority was merely assumed from his position as cashier and therefore existed as a matter of law. The court charged the jury that such assumed authority could not and did not exist when the money, or its equivalent was not paid into the bank simultaneous with the issuing of the certificate (89-90), which has heretofore been controverted as a correct proposition of law. This charge expressed clearly to the jury the view that no implied authority existed in favor of the defendants since nothing of value passed to the bank at the time the blank certificate was given to W. G. Simpson by the cashier S. D. Simpson in March in Caldwell, Idaho. Therefore the issue is clear cut. The court used the following language:

“In other words, there is no general authority in a cashier to issue a certificate of deposit, except in cases where the bank has received the money or its equivalent and the fact that the board of directors may know it to be the practice

of the cashier to issue certificates of deposit covering monies actually received and acquiesced therein does not imply an assent upon their part to the issuance of a certificate when no money or other thing of value is received, and so in this case the fact that the board of directors may have known of and acquiesced in the practice of issuing certificates where deposits were actually made, would constitute no warrant to the defendant cashier to issue the certificate in question without receiving for the bank and to its credit an equivalent in value'' (89-90).

It cannot be contradicted, however, that such general authority over the bank and its affairs would authorize a good intentioned man to attempt to do for the benefit of the bank what the defendants did in this case, and if such things were done with **good intentions** they were neither illegal, immoral, nor against public policy, though they may have been loose business and hence the authorities cited in support of this proposition are absolutely in point as the general doctrine of ratification applied.

All of the requirements of a valid ratification existed. The directors knew the facts and they elected to act and they did act. A ratification of the act of an agent is equivalent to the possession by him of a previous authority and operating upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. To ratify is to give validity to the act of another, says the Supreme Court, in *Norton v. Shelby*, 118 U. S. 425, and is equivalent to possession by the agent of a previous authority, *Storey on Agency*, 9th Edition, Sec. 239, Notes 1 and 2, and a

multitude of authorities cited in Note 3 on page 697 of Volume 9 of the Encyclopedia of the United States Supreme Court Reports. The general rule is that such ratification—that is, ratification with knowledge, in the absence of fraud—operates upon the act ratified precisely as though authority to do the act had been previously given. When the act is so ratified it is as binding upon the principal as if he had given original authority to that effect and a ratification relates back to the time of the act which is ratified. A subsequent ratification is equivalent to a prior order.

Manifestly it seems that the defendants should have been permitted to prove the action of the directors.

“EQUIVALENT IN VALUE.”

The learned trial judge said that there would be no presumed authority for the cashier to issue a certificate unless the bank received to its credit an “Equivalent in value.” Now, may I, in all seriousness, ask just what was the “Equivalent in value” of a blank certificate which called for no amount, was payable to no one and matured at no time? What equivalent in value could have been deposited with the bank?

DEFENDANTS’ TWENTY-NINTH ASSIGNMENT OF ERROR.

The court erred in failing and refusing to give defendants’ requested charge No. 4-A, or the substance thereof, wherein it was sought to have the jury told that if the defendant, S. D. Simpson, delivered to the defendant, W. G. Simpson, in good faith and without any intent on his part to defraud the bank, the certificate in question, and that W. G. Simpson disposed of said cer-

tificate with the intent of applying the proceeds thereof to the use of the bank and did send the proceeds thereof in good faith to his co-defendant S. D. Simpson, for that purpose, then and in that event, they should acquit the defendant, W. G. Simpson, because such instruction stated the law (159-160).

STATEMENT.

The defendants requested the court to charge the jury in substance that if W. G. Simpson disposed of the certificate in question with the intent of applying the proceeds thereof to the use of the bank and did send the proceeds thereof in good faith to his co-defendant, S. D. Simpson, for that purpose, then and in that event they should acquit the defendant, W. G. Simpson (159-160). The defendant, W. G. Simpson, succeeded in negotiating the certificate in Kentucky and sent the proceeds thereof to the Idaho bank for appropriate credit, together with a letter, a copy of which is as follows:

“April 11th, 1913.

Mr. S. D. Simpson, Cashier,
American National Bank,
Caldwell, Idaho.

My Dear Brother:

I have succeeded in placing your Time Certificate No. 1991 for \$2,500 and enclose you herewith my check on the Southern National Bank of Louisville for the proceeds of same, \$2,425.

I could not place the certificate direct but had to put up my note for the amount and attach the certificate to same as collateral, therefore it is made out in my favor and dated March 27th, and due six months after date, which will mature in ample time to take care of my note.

You will therefore debit 'Interest Paid' \$75 and my check enclosed for \$2,425 will make the credit of the certificate \$2,500 which I suggest that you enter as 'Time Certificates for Money Borrowed' while the C-D is not in a way placed, it is placed because it is out as collateral to my note for the use of the bank.

I had to pay 6% for the money as I could not get it at 5%. Could I have gotten it at 5% rate direct without having to put up my note, it could be entered as a regular C-D but money is tight in this section as well as in the West.

I hope this will give you some relief and if I am able to handle the others or any of them will do so and report to you, giving numbers, dates, amounts, etc., so that the proper entry can be made at that end of the line; in the meantime I hold the other certificates subject to your orders and I assure they are safe in my deposit box and will be taken care of and accounted for to you at any time'' (127-128).

The defendant, S. D. Simpson, made an error and credited it to W. G. Simpson's individual account.

Exceptions were reserved to the court's failure to give the charges (88).

The court charged the jury on this question in his remarks with reference to S. D. Simpson and nowhere did he submit this issue when he began to charge directly upon the case of W. G. Simpson (83-87).

In charging upon the defendants, in that portion of the charge relating to S. D. Simpson he merely tells the jury that if what S. D. and W. G. Simpson say about it is true then, of course, the jury could not convict (83-84), but he does not tell them that if they

have a reasonable doubt as to whether it is true or not, they should acquit.

In commenting on the testimony of the defendants who had chosen to testify, the court said:

"Of course, if you find that the defendants have testified truthfully, then you will give the same force and effect to their truthful testimony that you will give to the testimony of any other witnesses" (86).

ARGUMENT.

A careful verification of the foregoing statement shows how meagerly the defenses of the defendants were submitted to the jury and how meagerly, not to say sparsely, the defenses of the defendant W. G. Simpson, were submitted.

Again, the ~~defendants~~ ^{jury} were told that if they did finally find that the defendants had testified **truthfully**, then they should give the same effect to their **truthful** testimony as they gave to the testimony of any other witnesses. Without saying that the testimony of such other witnesses should also be **truthful** and be found to be truthful by the jury.

The submission of an affirmative defense is always obligatory and should be accompanied with the additional charge that if the ~~defendants~~ ^{jury} have a reasonable doubt as to its correctness or truthfulness they shall resolve that doubt in favor of the defendants.

It is respectfully maintained that this action constituted a reversible error as to W. G. Simpson without any question of a doubt.

CONCLUSION.

The treatment of the foregoing assignments of error

includes practically all of the questions raised in the thirty-one assignments and submits for the court's determination the following contentions:

(a) There was error in the court's action on the plea of jeopardy.

(b) There was error in the court's action on the demurrers and motion to quash.

(c) There was error in the court's ruling on the ratification by the directors of the issuance of the certificate of deposit.

(d) There was error in the court's ruling as to venue or place where the certificate was issued or put forth.

(e) There was error in the method pursued in holding the jury without accommodations for rest or deliberation.

(f) There was error in the manner in which the question of intent was submitted to the jury.

(g) There was error in the court's charge and in his refusal to give certain special charges.

(h) There was error in admitting incompetent testimony.

The whole case arose over the desire of the defendants to do something for the bank, and it is respectfully suggested that a good-faith effort and a subsequent mistake and a later repairing of that mistake without any injury whatsoever to the institution should be in insufficient in this splendid country to warrant the taking of the liberty of two citizens for five years.

For the errors pointed out we have the honor to

respectfully ask that the indictment be ordered dismissed and the judgment reversed, or, at least, that the cause be reversed and remanded.

Respectfully,

JAMES H. HAWLEY,
WILLIAM H. ATWELL,
Attorneys for the
Defendants-in-Error.

ADDITIONAL EXPLANATION.

The indictment upon which the trial was had in September, 1914, and the indictment upon which the trial was had in 1915 bore the same number, to-wit: No. 563. The clerk, of course, filed all of the papers pertaining to No. 563 in said file and therefore the court will find a number of special charges in the record which appear to be duplicates, or some of which appear to be inapplicable to the case as now presented. This is explained by the fact that the special charge requested and filed upon the first trial are also included in this record as well, of course, as the special charges and requests upon the second trial. It is thought, however, that the numbers in the parenthesis in this brief will assist the Court in avoiding any confusion.

The special charges found on pages 25 to 33 inclusive are the charges of the first trial in September, and the requested charges on pages 34 to 51 inclusive are the requested charges of the second trial.

IN THE
United States Circuit Court
of Appeals
FOR THE NINTH CIRCUIT

No. 2608

W. G. SIMPSON AND S. D. SIMPSON, PLAINTIFFS
IN ERROR,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT
IN ERROR.

ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF IDAHO,
SOUTHERN DIVISION.

Brief and Argument for Defendants in Error

J. L. McCLEAR,
United States Attorney, District of Idaho.

J. R. SMEAD,
Assistant U. S. Attorney, District of Idaho.
Attorneys for Defendant in Error.

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SOUTHERN DIVISION.

Brief and Argument for Defendants in Error

In this case, as there are thirty-one assignments of error on the part of the defendants, only part of which are argued by defendants' attorneys, we will take up the arguments as they are presented in the brief of defendant, and we will refer to plaintiffs in error as defendants, as has been done by the attorneys for plaintiffs in error.

DEFENDANTS' FIRST ASSIGNMENT OF ERROR.

"The Court erred in overruling defendants' plea of jeopardy and former acquittal."

On the trial of the case on September 14, 1914, after the

opening argument for the Government, two attorneys for the defendants had made their argument and during the argument of the third attorney for the defendants, the question of sufficiency of the indictment was raised by the attorney in his argument and he called the attention of the court to the fact that the indictment did not contain the words "without authority of the board of directors" and moved the court for a peremptory instruction to the jury to return a verdict of not guilty, which the court refused to do, and dismissed the indictment on account of the defect mentioned by the defendants' attorney, which formed the grounds of his motion, and held the defendants for the next grand jury, which was called in February, 1915, which jury found a new indictment against the defendants.

On the 23rd day of February, 1915, on being arraigned on the new indictment, defendants filed a plea of former jeopardy, the Government filed a replication to the plea, and the journal entry of the court proceedings was introduced in evidence, which is as follows:

"September 18, 1914.

"The trial of this cause adjourned on yesterday for further hearing and was this day resumed. Jury called and found to be present and the respective counsel being in court. C. H. Lingenfelter, Esq., addressed the court and jury on behalf of the defendant S. G. Simpson, followed by Wm. A. Stone, Esq., on behalf of the defendant, W. G. Simpson. Here the defendant, by Wm. A. Atwell, Esq., moved the court for a peremptory instruction to the jury to return a verdict of not guilty, which motion was opposed by counsel for plaintiff and after argument the court ordered that said motion be denied, to which ruling the defendants by their counsel excepted in due form of law, which exception was allowed. The court thereupon ordered that the indictment in this cause be quashed and discharged the jury from the further con-

sideration of said cause, and upon motion of the United States District Attorney it was ordered that cause be re-submitted to another grand jury and ordered that the defendants be each admitted to bail in the sum of \$2500.00."

After argument by counsel for the Government and the defendants, the court directed the jury to find for the Government on the plea of former jeopardy, which was done, and then the defendants pleaded not guilty and the trial proceeded, resulting in a verdict of guilty as to both defendants.

ARGUMENT.

In the case of *Ball vs. United States*, 163 U. S., p. 662, cited by defendants, the defendants sued out a writ of error, the judgment and sentence were reversed, and the indictment ordered to be dismissed. The defendants were tried again upon a new indictment for the same offense and pleaded former jeopardy, which plea was overruled by the court, which action was upheld by the Supreme Court. And the Court says in that case as follows:

"Their plea of former conviction cannot be sustained because upon a writ of error, sued out by themselves, the judgment and sentence against them were reversed and the indictment ordered to be dismissed. The Court, therefore, rightly overruled their plea of former jeopardy and cannot be prejudiced by the Court afterwards permitting them to put in evidence the former conviction and instructing the jury that the plea was bad."

Bishop's New Criminal Law, Vol. 1, Sec. 1021, paragraph 2, states:

"An indictment so ill in its averments that any judgment thereon will be reversible for error, is too defective a preliminary thing of record for a jeopardy upon it to be possible. Therefore, though there has been a form of trial on it, the defendant may be indicted anew."

Paragraph 4 of the same section reads :

“In reason, and not contrary to the authorities, if on the verdict coming in the prosecuting officer discovers a defect in the indictment, he may, instead of moving for sentence, enter a nolle prosequi, and indict anew. The Tennessee court, without passing on this exact question, held ‘that a nol. pros. entered with the assent of the court, even after the jury is impaneled and proof heard, where the indictment is bad, does not operate as an acquittal, as there was no legal jeopardy.’ Indeed, plainly since there can be no jeopardy on an invalid indictment, any discontinuance of it while there is no subsisting judgment is no bar to a subsequent prosecution for the same offense.”

Paragraph 4, Sec. 1027, Bishop’s New Criminal Law :

“Where at any stage of the proceedings the defendant procures the indictment to be quashed, he cannot in bar to a new one assert that the first was good and he was in jeopardy under it.”

See also,

United States vs. Jones, 31 Fed. p. 725 :

Neither at common law nor by our constitution will a conviction or acquittal, when the penalty has not been inflicted upon a void proceeding or indictment, operate as a bar to a subsequent indictment for the same offense. Also *ex parte Lange*, 85 U. S. 163, 21 L. E. 873.

In the case of *Thompson vs. United States*, 155 U. S. 271, 39 L. E. 147.

“Courts of justice have authority to discharge a jury from giving any verdict whenever in their opinion there is a manifest necessity for the act or ends of public justice would otherwise be defeated and to order a trial by another jury and the defendant is not thereby twice put in jeopardy within the meaning of the fifth amendment to the Constitution of the United States.”

Mr. Justice Shiras states in his decision that the question raised by the plea of former jeopardy is sufficiently answered by citing

United States vs. Peraz, 22 U. S., p. 9.

Simmons vs. United States, 142 U. S. 148.

Logan vs. United States, 144 U. S. 263.

DEFENDANTS' NINTH ASSIGNMENT OF ERROR.

"The Court erred in overruling the defendants' demurrer and motion to quash the bill of indictment because said indictment is in fact duplicitous in that it attempts to charge more than one offense in the same count, to-wit: Commission of an act to injure the bank, commission of an act to defraud the bank, the issuing of a certificate of deposit, and putting forth of a certificate of deposit—four separate and distinct felonies."

On page 27 of defendants' brief it is stated by defendants' attorneys that the indictment charges "and with the intent to injure and defraud said association," which is used three times in the indictment; that is, that the conjunction and between the words "injure" and "defraud" is used in the indictment in place of the disjunctive "or." In answer to this argument we cite the case of *Ackley vs. United States*, 200 Fed., p. 221.

"Where a statute denounces several things as a crime the different things connected by the disjunctive 'or' the pleader must connect them by the conjunctive 'and.' Before evidence can be admissible as to more than one act and that an indictment drawn in this way is not bad for duplicity, but on the other hand, if the pleader in drawing this indictment in question had used 'or' instead of 'and' it would have been bad for uncertainty."

This objection has already been passed on in this Court, in the case of *Tiberg vs. Warren*, 192 Fed. 458.

“The specific objection of duplicity is made to the complaint, because it alleges a breaking and an attempt to break. We understand, however, that where the statute makes the commission of different acts each an offense, and such acts are stated disjunctively in the statute, two or more or all such acts may be embraced in a single count in the indictment, but that they should be set forth conjunctively; that is to say, where the word ‘or’ appears in the statute the word ‘and’ should be employed in the indictment.”

As to the last part of this assignment of error, found on page 32 of brief of plaintiff in error, it is only necessary in answer to this to read the certificate in question found on page 9 of the transcript of record.

DEFENDANTS' THIRD ASSIGNMENT OF ERROR.

“The Court erred in refusing to permit the defendants to prove by themselves and the board of directors of the American National Bank of Caldwell that the issuance of the certificate of deposit in question was ratified by the board of directors as soon as they knew it had been issued and arranged for its payment by the discounting of Director Walter's note.”

ARGUMENT.

The act of defendants in issuing a certificate of deposit, as charged in the indictment, was a criminal act. Section 5209 R. S. U. S. And no ratification by the board of directors of the bank of such act could make it any less criminal. In other words, we fail to see how an act constituting a crime can be ratified by anyone so as to take away its criminality. In the case of contracts or dealings between parties, or their agents, acts may be ratified but in this case where the act charged was with intent to injure and defraud the bank there was and could not be a ratification of the act, and further than that the evidence in the case fails to show that there ever was

a meeting of the board of directors, but on the contrary shows that there was no meeting of the board of directors, but on the return of the certificate from Kentucky on the 27th day of September, 1913, the certificate was paid, not because any money was in the bank, which the certificate certified was there to pay it when due, but by Director Walters giving his note in payment thereof, and even after the certificate was sold or discounted in Kentucky, the money returned to Idaho to the American National Bank, it was not placed to the credit of the certificate of deposit but was placed to the credit of the defendant, W. G. Simpson. And before the certificate became due on September 27th, this \$2425.00, the proceeds of the certificate of deposit had been checked out of the bank by W. G. Simpson and his brother, S. D. Simpson, and this was the only, or nearly the only, deposit, the only one covering anywhere near the amount of money checked out by W. G. Simpson during the six months intervening between the issuance of the certificate of deposit and the time when the same came due.

The question of the letter of instructions of W. G. Simpson and S. D. Simpson was submitted to the jury, which found against the contention of defendants, and in this connection the evidence of S. D. Simpson was that no letter of instructions came with the proceeds of the certificate of deposit, while his brother, W. G. Simpson, claimed that he gave very explicit instructions as to what should be done with it. Under this assignment of error it is claimed, on the part of the defendants, that the court erred in refusing to give special charge No. 2, which is found on page 36 of defendant's brief. All we need to say in answer to this is that a cashier in the regular course of business might issue certificates of deposit when the money or the equivalent thereof was paid to the bank and

could be used in payment of the certificate when it was afterward presented for payment, but in the regular course of business no cashier could issue and put in circulation, or put forth a certificate of deposit, or sign a certificate of deposit in blank and send it out to be filled out and negotiated, increasing the liabilities of the bank to the amount of the certificate without, at the same time, receiving full value for the amount called for by the certificate. This instruction would say to the directors of the national bank, or to the officers of a national bank, you can issue certificates of deposit to anyone applying to your bank for such certificate. It may be out for six months, or a longer period of time, a liability of your bank unknown to the Comptroller of the Currency, unknown to the bank directors, unknown to anyone except the cashier and the man to whom he issued it, increasing your liabilities to that amount, and at the time that such certificate becomes due it may be presented at your bank, your board of directors ratifies such act and thus remove from the act all criminality.

If such were the law, no bank officer, Comptroller of the Currency, agents appointed to investigate banks, or anyone in any way interested other than the man who issued the certificate, and the one to whom it is issued, could ever know the condition of the bank.

It is claimed on the part of the defendants that there was a ratification of the acts of the defendants by the board of directors. The Court instructed the jury that they must find there was an intent on the part of defendants to injure or defraud the association at the time the certificate was issued and put forth in order to convict, and the jury so found, and such being the case the crime was committed at that time and

no act on the part of the directors could afterward divest the acts of defendants of its criminality. A principal may ratify the acts of an agent and in many ways an act of one person may be ratified by another or others, but we fail to see how an act, which is made a crime by the law, can be divested of its criminality by an act of another or others. All the cases cited by defendants in their brief on pages 37 and 38 arose out of the ratification of contracts and are not any way in point in the consideration of a criminal case. If the acts of defendants were personal acts against the directors of the bank they might condone the offense, but when the acts complained of were a violation of the laws of the United States the directors of the bank would be powerless to set aside that law and make a legal act of what the law says is a crime. Did the board of directors ratify the issuance of a certificate of deposit? For six months such certificate was out as an obligation of the bank and during that time the bank's liabilities were increased to the amount of the certificate. The directors knew nothing of its existence; the bank examiner knew nothing of its existence; no record of it had been made on the books of the bank; it had been taken from the bank's blank certificates in numerical order far enough ahead of March 27, 1913, so that presumably it would not be reached for six months and when its number was reached the number on another certificate was changed in an attempt to cover up the transaction and when it was presented September 27, 1913, for payment there were no funds with which to pay it. Under those circumstances, did the act of the directors, or one of them, in raising the money to take care of the certificate of deposit ratify the crime committed six months previously; and, further, did the acts of defendants show a desire on their part

to realize funds for the bank? The proceeds of the certificate of deposit were credited to the private account of W. G. Simpson, and long before the certificate of deposit became due had been checked out by the defendants for their own use.

Judge Benedict in the case of *United States v. Eno*, 56 Fed., p. 218, uses the following language :

“The president of a national bank is not the association, nor are the president and directors the association. They are only officers of the association. The money of the stockholders and of the depositors in the association are not the moneys of these officers, but of the association; and it has not yet been held that a national bank may be pillaged of such moneys by its president, with impunity, provided the act be done in pursuance of a conspiracy between the president and the directors, or a majority of them.”

The acts of defendants in this case if acquiesced in by the board of directors in the first instance, and the certificates given out as they were given out, and used by the defendants in this case, if done with the knowledge, consent and approval of the board of directors would have constituted a conspiracy on the part of the defendants and the directors.

DEFENDANT'S FOURTH ASSIGNMENT OF ERROR.

“That the Court erred in refusing to permit the defendants to show by the defendant, S. D. Simpson, that he, the defendant, S. D. Simpson, executed a warranty deed to his home,” etc.

ARGUMENT.

On page 82 of Transcript of Record, the Court in his charge to the jury uses the following language :

“In September, when the certificate of deposit was sent to another bank at Caldwell for collection, and was pre-

sented for payment, some arrangement was made by which the defendants, or one of them, took care of it and protected the bank against loss. Such is the testimony on behalf of one or both of the defendants."

Such being the case, what was afterwards done by one, or both, of the defendants in paying the amount that Director Walters had paid to take up the certificate was immaterial and properly rejected by the Court. In this connection we wish to quote from the case of *United States vs. Harper*, found in 33 Fed., p. 471, and quote from the top of page 492, as follows:

"Gentlemen of the jury, the defendant has explained to you, and which, by the way, is not competent nor relevant to this transaction, that at this time he was making desperate and heroic efforts to save the bank. This is not relevant in this case. The man who scuttles a ship may, as she is in the act of sinking, exert desperate and even heroic efforts to save it from the peril which his own wrongful act has produced; but such efforts do not change the character of the wrongful act which put the vessel in danger. If I were to wrongfully fire upon you and produce a dangerous wound, I may, with all my skill and energy, try to stanch the flow of blood, but it does not change the criminal act which produced the wound. If he had intended to refund all those moneys, and had had the means to do it, and had come in on the morning of the twentieth of June and said, 'I have taken out \$2,-800,000 from the funds of this bank, and here is the money in gold coin to replace that sum,' it would not change the criminal character of the previous act. So, gentlemen, do not be misled by anything of this sort."

DEFENDANT'S FIFTH ASSIGNMENT OF ERROR.

"There was error in the Court's ruling as to venue, or place where the certificate was issued or put forth."

ARGUMENT.

To sustain the Government's position as to this assignment, we cite Section 42 of the Judicial Code of the United States, R. S., 731, as follows:

"When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein."

The above section of the Revised Statutes was considered by the Supreme Court of the United States in the case of *Hyde vs. United States*, 225 U. S., 347, 56 Law Ed. 1114:

"The doing of the overt act prescribed by U. S. Rev. Stat., Sec. 5440, as necessary to the offense of a conspiracy to defraud the United States, defined by that section, renders applicable, where the place of the overt act and of the entry into the unlawful combination were in different Federal judicial districts, the provision of Sec. 731 (U. S. Comp. Sta. 1901, p. 585), creating a double jurisdiction where an offense against the United States is begun in one district and completed in another."

and in the case of *Brozen v. Elliott*, 225 U. S. 392, 56 Law Ed. 1136, where the contention now made by the Government was upheld. To the same effect are the cases in *re Palliser*, 136 U. S., 257, 34 Law Ed. 514, *Burton vs. United States*, 202 U. S. 344, 50 L. Ed. 1057, and *Moses Haas vs. Wm. Henkel*, 216 U. S., p. 460, 54 L. Ed. 569.

There is no question in the present case but that the certificate of deposit was signed at Caldwell, Idaho, by S. D. Simpson, cashier, and given to his brother, W. G. Simpson, at that time president of the bank, and that it was in such a form

that all that was to be done by W. G. Simpson was to date it, which he says he did, Trans. 122, and dating it back to the day he received it from S. D. Simpson in Caldwell, Idaho, to fill in his own name, and the amount, which in this case was \$2500.00. According to the law as laid down in the decisions just cited and Section 42 of the Judicial Code, the Court was right in refusing to give special charge found on page 43 of the brief of plaintiffs in error, and he was right in refusing special charges Nos. 3 and 4, and the first special charge on page 45 of said brief, and committed no error in giving the charge on the bottom of page 45 of said brief.

DEFENDANT'S SIXTH ASSIGNMENT OF ERROR.

The sixth assignment of error is fully answered in the argument under the ninth assignment of error as to the use of "or" and "and" in the indictment.

DEFENDANT'S TENTH ASSIGNMENT OF ERROR.

"The Court erred in overruling the defendant's demurrer and motion to quash the indictment because said indictment states no offense against the laws of the United States in that the acts therein attempted to be alleged might be entirely innocent because the statute does not require that one shall have on deposit with a bank that issues to him a certificate of deposit the sum of money therein specified nor any part of it."

The indictment negatives the statement in the certificate, namely, "that W. G. Simpson has deposited in this bank \$2500.00 payable to the order of himself in current funds on the return of this certificate, properly endorsed, six months after date." This was sufficient to allow testimony that no such deposit was made and the books of the bank showed that no such amount was on deposit at that time by the defendant,

W. G. Simpson, and if, as suggested by defendant's attorneys in their argument, a person had the money in his hand, or a note which the bank would accept, or made any other arrangement satisfactory to the bank, or its officers, they would issue him a certificate of deposit. We agree with defendants' attorneys as to the officers issuing a certificate in such case, and if they did, the note, money or satisfactory arrangement would be such as to represent the amount of money named in the certificate, and the bank books would show it, but such are not the facts in this case as claimed on the part of the Government or on the part of either of the defendants. Such issuing, if the arrangement had been made, the note given, or the money handed to the cashier, would have been in the regular course of business. The indictment alleged a state of facts that showed an offense against the laws of the United States, and if more was alleged than necessary the most that could be claimed for it would be surplusage.

DEFENDANT'S THIRTEENTH ASSIGNMENT OF ERROR.

"The Court erred in overruling the defendants' motion in arrest of judgment because such motion specifically attacked the validity of the indictment, the validity of the trial, showed that the defendants had been formerly in jeopardy and formerly acquitted and that the Court had erred in the conduct of the trial and in giving certain instructions to the jury and in refusing to give certain special instructions of the defendants, all of which more particularly appears from said motion to arrest which is referred to and made a part of this Assignment."

ARGUMENT.

The court had in its charge given a very full explanation of the material elements of the offense charged against the

defendants as follows, Trans. 76: First, that the Bank of Caldwell, of which S. D. Simpson was cashier, was a National Bank Association; Second, that he, S. D. Simpson, was at the time cashier thereof; Third, that S. D. Simpson issued or put forth the certificate in question, and that he did so within the State of Idaho; Fourth, that the issuance of the certificate was without authority of the board of directors; Fifth, that it was issued with intent to injure or defraud the bank or its depositors or stockholders. It is necessary for you to find in the affirmative upon all of those five issues in order to find him guilty, and further, that as to W. G. Simpson, it was necessary, in addition to that, to find that he aided and abetted S. D. Simpson in so acting, and with intent on the part of him, W. G. Simpson, also to injure or defraud the bank.

The court then explains reasonable doubt, and that they must be satisfied beyond a reasonable doubt of every material element as charged in the indictment before they could convict. Defendants' attorneys, as one of the grounds of this argument, states that when the jury were called into court in the night time, having deliberated for some time, they were not satisfied on the question of intent. The Court then told them practically what he had given them in his instructions regarding intent, and no exception was taken to what he told them at that time, and such re-statements were not suggested by anyone as stated in the statement on page 54 of the Brief of Defendants. The jury was out less than 12 hours and we respectfully submit that the jury were in comfortable quarters, given a breakfast in the morning, and were not out a sufficient length of time to be in such mental or physical condition that they could not render a true and just verdict.

Hyde vs. United States, 225 U. S. 347, 56 L. E.
1114.

In the case where the jury had been kept together during a long trial, and after deliberation for three days and nights and had been further instructed a number of times during that time, the Supreme Court holds that the verdict was not on account of coercion.

DEFENDANT'S FOURTEENTH ASSIGNMENT OF ERROR.

“The court erred in failing to grant these defendants a new trial because the verdict was the result of coercion and of mental and physical exhaustion.”

It is not claimed on the part of the defendants' attorneys that the court made use of any instructions which would amount to coercion, but that the only coercion consisted in the forced continuance of deliberation through the long hours of the night resulting in some sort of compromise. The jury did not receive the instructions until about 9:45 in the evening and were called back in the court room about 1 o'clock in the morning, where they received some additional instructions or re-statement of the instruction on the question of intent; were then sent back to their room, and in the morning, about 7:00 o'clock were taken to breakfast and soon after their breakfast returned a verdict of guilty as to both defendants. It is claimed if there was any foundation for the claim of the defendants' attorneys that the verdict was a result of physical and mental exhaustion, it is hardly probable that such would be the case where soon after having their breakfast they arrived at a verdict. If the jury had found a verdict

before they had their breakfast it might then be more reasonably claimed that it was because of exhaustion after the night's work. But in this case it can hardly be claimed that such is the case, especially as the jury had not been out twelve hours when they arrived at a verdict. The attorneys in their brief cite the case of *Suslak vs. United States*, 213 Fed. p. 913, and is cited as an authority for their contention, which only goes to the question of recalling the jury for additional instructions, and the Judge, in rendering that opinion, says, on page 919, "it is not an uncommon practice, and it is entirely within the discretion of the Court to recall the jury for the purpose of giving additional instructions."

In the case of *Peterson v. United States*, 213 Fed. p. 920, in which the judgment of conviction was reversed, it will be noted that the same Judge who wrote the opinion in this court presided in the case at bar and his watchful care of the rights of the defendants was such that the experienced criminal attorneys for the defense did not find anything in his instructions to object to, and if, in fact, as stated by defendants' attorneys in their argument as to this assignment, "and if no objection was made then, none should be made now." *Robinson et al vs. VanHooser*, 196 Fed. 620. While the Peterson case was reversed, the instructions went so much further than the instructions in the case at bar that the Judge in writing that opinion was right in stating what he did regarding the instructions in that case, but did not make the mistake in this case of instructing the jury in such a way as was done in the Peterson case, and which he had so shortly before criticised.

DEFENDANT'S TWELFTH ASSIGNMENT OF ERROR.

"The court erred in permitting the Government to offer testimony showing that the defendant, W. G. Simpson, had borrowed from the American National Bank in September, 1913, \$3500, because such testimony was highly prejudicial, threw no light upon the issue being tried, and certainly had nothing whatever to do with the intent that W. G. Simpson had in March, 1913, when they issued, if they did issue, and put forth the certificate in question."

ARGUMENT.

All that was said, or about which testimony was received in the case about the \$3500 being borrowed by W. G. Simpson was in rebuttal of the defense that they had paid, or W. G. Simpson had paid, the \$2500. The Court states in his instructions on page 82 of the transcript:

"Evidence of this fact of payment would not have been received but for one consideration, and that is the contention of the defendants that the money which was realized by using the certificate as collateral in Kentucky got into the private accounts of the defendants as the result of a misunderstanding between them, and that the mistake was not discovered until W. G. Simpson came to Idaho about the middle of August. If, to illustrate my meaning, the defendants had immediately repaired the wrong, before others had knowledge of the existence of the certificate, you might very properly conclude that the restoration to the bank of the value of the certificate at that time tended to corroborate their intention of innocent mistake."

Then in rebuttal the prosecution introduced testimony showing that the money realized from this certificate of deposit in question had not been used to pay the certificate when it be-

came due but that W. G. Simpson came back to Caldwell in the early part of August, knew at that time, and S. D. Simpson knew, that the certificate of deposit No. 1991 had been negotiated and that they had used the money, and in the face of that fact W. G. Simpson borrowed \$3500 from the bank, did not pay into the bank the amount of the certificate at that time, but went back to Kentucky and in October, after the certificate had been paid by Director Walters at Caldwell, W. G. Simpson says he sent \$2500 to pay the amount of this certificate, T. 135.

We submit that the instructions of the Court on this question were proper and that the evidence introduced by the government by way of rebuttal in showing that the \$2500 had not been used for the purpose of paying the certificate, and that the \$3500 was borrowed from the bank early in September, when both defendants knew that the certificate was out and no record made of it. On the face of that fact, W. G. Simpson returned to the east and for over a month paid no attention to this certificate of deposit and how it should be taken care of when it became due. The attorneys for the defense in their brief on page 59 state as follows:

“In other words, the court said to the jury in substance, which drew its mind directly to this improper testimony showing that the defendant had secured \$3500 from the bank the 1st of September:”

and then follows in quotation,

“Now, gentlemen, if Simpson had used that \$3500 which he got about the 1st of September to pay this certificate, then you might properly consider such payment as tending to corroborate what they have said about being innocently mistaken.”

No such language was used by the Judge, nor any language that could be construed as meaning what is quoted above.

DEFENDANTS' TWENTY-THIRD ASSIGNMENT OF ERROR.

"The court erred in failing to give the defendants' requested charge No. 5 wherein it was asked that the jury be told in substance that any intent that might have originated after the date of the issuing of the certificate with reference to the use of the \$2,425 would not be the venal intent demanded under the statute and under the indictment before conviction, because the law demands that one's act be measured criminally by the intent existing at the time the act was committed."

ARGUMENT.

The Court charged the jury, "It is essential that a wrongful intent must have existed prior to the time the certificate was hypothecated in Kentucky, T. 84." The Court had also charged on page 70 as follows:

"The offense defined by the statute is not complete unless there was at the time an intent to injure and defraud the bank or some other person."

The first overt act was the signing of the blank certificate by S. D. Simpson, at Caldwell, Idaho, and turning same over to W. G. Simpson there. Something yet remained to be done to carry out the intent of the crime and in this case that was the filling out and negotiating or hypothecating the certificate of deposit, which was filled out in Mississippi, and hypothecated or negotiated in Kentucky. On this view of the case, the Court was right in giving the above instructions, and so far as the record shows no exception was taken at any time to the above quoted part of the charge. In support of this view,

we wish to call attention to the evidence of S. D. Simpson, T. 104, when he was asked how many blank certificates he had given to W. G. Simpson at Caldwell, and he states that he gave him five or six. "Beginning with 1991?" A. "Yes." And on page 106 T., he states that on August 1st he issued to Mr. Johnson a certificate of deposit for one hundred and some odd dollars and changed one certificate No. 2000 to 1991 because they had no No. 1991 in the bank. At this time he had the other blanks that had been given to W. G. Simpson and knew that No. 1991 was out and who had it, and in this he is corroborated by W. G. Simpson, who says on p. 131 T., as to the question of the other blanks, "My mind is not exactly clear on that; seems to me I returned them by mail in July, but I am not sure." In the next answer he states practically the same thing. Anyway, there was no break in the certificates as issued by the bank after the No. 1991 and certificates 1992, 1993, 1994 and 1995, which both defendants testified had been given to W. G. Simpson in March, were in their regular order in the certificate of deposit book, corroborating the testimony of both of these defendants that the other certificates had been returned when the Johnson certificate was issued and supported the government's view that the No. 1991 certificate of deposit was issued to Johnson, the number thereon being changed and was done for the purpose of covering up the original certificate 1991, which was in their hands and hypothecated at the bank in Kentucky. Taking this in connection with the reason given on page 115 T., by W. G. Simpson that while in Caldwell in March, 1913, he was informed by his brother that a large amount of public money would be withdrawn from the bank, aggregating several thousand dollars, and the effect it would have on the bank,

and then on April 11, 1913, only two weeks thereafter in a letter from Lexington, Ky., to his brother, Page, Trans. 127-8, he writes as follows:

"Your last statement shows a good reserve, and I cannot understand why you should carry such a large reserve for 15 per cent is all that is required by law, but I believe you should carry in that section at least 25 per cent, but it is better to be safe than sorry, so keep close to the shore, and if you need help I will do all I can to assist you."

There is no intimation in this letter anywhere that he was afraid of withdrawals from the bank, no inquiry as to how much money, if any, had been withdrawn from the bank, and the reason given, as he states, why he and his brother wished to raise money, seems to have been lost sight of entirely. And we find them, as shown by their own books and their own testimony, from this time on, using the proceeds of certificate of deposit No. 1991 for their own use. All this was before the jury. The letter, part of which is quoted above, was read to the jury, which found against the contention of defendants, and we submit that the evidence, even on the story of the defendants themselves should warrant the jury in finding the defendants guilty.

DEFENDANTS' TWENTY-FOURTH ASSIGNMENT OF ERROR.

"The court erred in failing to give the defendants' specially requested charge No. 6, wherein it was asked that the jury be instructed to acquit the defendants since the proof did not establish the allegations in the bill of indictment with reference to the issuing and putting forth of the certificate of deposit in question within the jurisdiction of the court."

In answer to the argument in this case on the part of de-

fendants' attorneys we cite the court to Section 42 of the Judicial Code, and by the defendants' own testimony this certificate of deposit No. 1991 was signed in blank at Caldwell, Idaho, on the 27th of March, 1913, or about that time, and used by the defendant, W. G. Simpson, as shown in answer to Assignment No. 23.

DEFENDANTS' TWENTY-EIGHTH ASSIGNMENT OF ERROR.

"The court erred in failing and refusing to give the defendants' requested charge No. 12, or the substance thereof, wherein it was sought to have the jury told that the law did not state when the consent of the board of directors should be secured for the issuance of a certificate of deposit, and therefore if they found that the board of directors, or if they had a reasonable doubt with reference thereto, accepted such certificate on September 27, 1913, accepted it as the debt of the bank, ratified its original issuing and putting forth and ordered the same paid, with full knowledge of all of the facts with relation thereto, then and in that event such consent and ratification dated back to the time of its original issuance and constituted a consent within the law, because the statute does not say how such consent shall be given, nor when such consent shall be given, nor does the statute fix any different rule of law than the well known rule of ratification, which dates back to the time of the doing of an unauthorized act and validates it the same as though the consent had been originally given at the very time the act was performed."

ARGUMENT.

In answer to this twenty-eighth assignment, this is sufficiently answered by the answer to the twenty-fourth and twenty-third assignments. Further than this, the records of the bank were all in evidence. Among the records was the record book showing the meetings of the board of directors dur-

ing the time the bank had been in existence, introduced by the defendants themselves, and if any such ratification as above shown was made, or could be made by the directors, it would show, or should show, in the records, and as explained on the part of the Government that there was never a ratification and could be no ratification. It is further claimed in the argument of this case on the part of defendants' attorneys, on page 71 of their brief, as follows:

"The learned trial judge said that there would be no presumed authority for the cashier to issue a certificate unless the bank received to its credit an 'equivalent in value.' Now, may I, in all seriousness, ask just what was the 'equivalent in value of a blank certificate which called for no amount, was payable to no one and matured at no time?'"

In answer to the above, we can say that the \$2500 was the equivalent in value in this particular case. By signing a certificate in blank and sending it out, the cashier placed it in the power of whoever had it, to make the amount whatever the party receiving it wished to insert as the amount of the certificate. Various statements of this question on the part of defendants' attorneys seems to suggest its own answer, and with the power, as they claim, of the directors to ratify whatever may have been done by this party, whoever it might be, placed it within the power of the directors, if such could be done, to ratify a certificate of deposit for any amount, and to remove the criminality of the act by ratification. Surely, no such power lies with the directors or officers of the bank, when, as in this case, a certificate might be out for months unknown to everyone that should know the condition of the bank except the parties who would sign the certificate of deposit and negotiate the same.

DEFENDANTS' TWENTY-NINTH ASSIGNMENT OF ERROR.

"The court erred in failing and refusing to give defendants' requested charge No. 4-A, or the substance thereof, wherein it was sought to have the jury told that if the defendant, S. D. Simpson, delivered to the defendant, W. G. Simpson, in good faith and without any intent on his part to defraud the bank, the certificate in question, and that W. G. Simpson disposed of said certificate with the intent of applying the proceeds thereof to the use of the bank and did send the proceeds thereof in good faith to his co-defendant, S. D. Simpson, for that purpose, then and in that event, they should acquit the defendant, W. G. Simpson."

ARGUMENT.

Referring to page 83 of the Transcript of Record, the Court charged the jury as follows:

"I have further to advise you that if the certificate was issued by the defendant, S. D. Simpson, at or about the time mentioned in the information, and by said defendant delivered to the defendant, W. G. Simpson, in good faith, and without any intent on his part to defraud the bank in question, and that the defendant, W. G. Simpson, disposed of said certificate of deposit with the intent of applying the proceeds of the disposition of said certificate to the use of the said bank, and sent the proceeds thereof in good faith to his co-defendant, S. D. Simpson, with the expectation and instruction that the said defendant, S. D. Simpson would deposit said proceeds in said bank for the use and benefit of the bank, you could not find the defendant W. G. Simpson, guilty."

Not satisfied with this, the Court goes further and says:

"Nor, in such case, if S. D. Simpson innocently believed that the money he received was the personal funds of his brother, should he be found guilty. Nor, if the certificate was issued in good faith, for the purpose of getting funds for the bank and was hypothecated as col-

lateral for that purpose, and if the funds so realized were in good faith sent to the bank for its use and benefit, would the defendants or either of them be guilty of the offense here charged, if thereafter, that is, after the funds were sent to the bank, in good faith, for its use and benefit, and received by it, the defendants then misapplied them by appropriating them to their own personal use."

The Court in this case charged the jury in almost the words that the attorneys by Charge No. 4-A requested. He had formerly told them that they must find on all the material elements of the defense beyond a reasonable doubt and then explained very fully the law of reasonable doubt.

We further wish to call the Court's attention to the fact that a copy of the letter introduced as evidence on pages 127 and 128 of the Transcript of Record is not copied in full in the brief of defendants, pages 72 and 73.

We respectfully submit that the evidence was sufficient to convict the defendants of the crime charged; that the indictment was sufficient; that none of the assignments of error on the part of defendants are well taken, and the instructions of the Court to the jury were fair to the defendants and each of them and correctly stated the law.

Respectfully,

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Residence, Boise, Idaho.

IN THE
**United States Circuit Court
of Appeals**

FOR THE
NINTH CIRCUIT.

W. G. SIMPSON and S. D. SIMPSON.

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendants in Error.

**MOTION OF PLAINTIFFS IN ERROR FOR A RE-
HEARING.**

WILLIAM H. ATWELL,

Attorney for Plaintiffs in Error,

W. G. Simpson and S. D. Simpson.

Filed
1937-10-15
F. D. Warlick

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THE UNITED STATES OF AMERICA,

Defendants in Error.

**MOTION OF PLAINTIFFS IN ERROR FOR A RE-
HEARING.**

May it Please the Court:

Come now the plaintiffs in error, by their attorney, William H. Atwell, and petition for a rehearing and show that the opinion and judgment rendered herein on February 7, 1916, is erroneous and the cause should be re-heard, for the following reasons, to-wit:

I.

Because the authorities cited by this Honorable Court in support of its judgment that the trial court was correct in overruling the motion to quash and the demurrers and exceptions to the indictment which were

based on an alleged duplicity therein are not responsive to nor do they support the conclusion that a single count containing more than one offense is not duplicitous.

The authorities cited in 22 Cyc. 380, arise from the consideration of cases which treat of acts of commission or omission as forming component parts or preliminary stages of a single transaction, as illustrated by the case of *United States v. Fero*, 18 Fed. 901, which is based upon a statute declaring it to be offensive for a person to receive anything of value under a threat of informing **or** as a consideration for not informing.

In the case from the Eighth Circuit, *Ackley v. United States*, 200 Fed. 221, the question of duplicity was not before the court. The indictment in that case was being attacked because it did not state a crime, and the court, in passing upon that demurrer, merely, in an abbreviated paragraph, held that the indictment must follow the statute creating the offense, and then, by way of dictum, observed that the exception to that rule was, that, if a statute denounced several things as a crime, the different things thus enumerated being connected by the disjunctive, **or**, the pleader must connect them by the conjunctive, **and**, before evidence could be admitted as to more than one act, and then continued to observe that if the pleader pursued this course, he could not use the word **or** in such an indictment, because then it would be bad for uncertainty, but must use the word **and** which would not render it bad for duplicity.

In the case of *Tiberg v. Warren*, 192 Fed. 464, the Court of Appeals for the Ninth Circuit was considering an indictment which charged a breaking and an attempting to break, and was considering the question of removal merely, and there held, in a paragraph thirteen lines long, that where the Statute makes the commission of different acts an offense and such acts are stated disjunctively in the statute, two or more or all of such acts may be embraced in a single count in the indictment, but they must be set forth conjunctively; that is to say, where the word **or** appears in the statute the word **and** should be employed in the indictment, and concludes with this phrase, "especially is this true where the indictment or complaint is challenged in a removal proceeding."

Against these authorities, which I respectfully contend are not in point, for the reason that the matter at issue here was not at issue there, are the cases of *Billingsley v. United States* (Eighth Circuit), 178 Fed. 659, and the case of *United States v. Norton*, 188 Fed. 259. In the latter case the identical question before the Court was there before the court, and an indictment, drawn precisely as is the instant indictment, was held to be duplicitous upon preliminary motion and therefore quashed.

It is respectfully submitted that it is an elementary rule of pleading that an indictment or information must not, in the same count, charge the defendant with two or

more distinct and separate offenses and in case it does so, it is bad for duplicity, if the offenses were inherently repugnant or not different stages in one transaction, or involve different punishments. 22 Cyc. 376, and cases there cited.

The issuance, therefore, of a certificate of deposit with intent to injure, and the issuance of a certificate of deposit with the intent to defraud, are not different stages in one transaction, but are two separate and distinct offenses, neither of which is related to nor dependent upon the other; neither of which is an omission connected with an act of commission, but both stand out separate and distinct, entirely complete and evidently directed by the law maker to correct a separate and distinct species of abuse.

In Wharton's Criminal Pleading and Practice, pp. 244-254, and in 1st Bishop's Criminal Procedure, pp. 443-440, it is laid down as axiomatic that two or more offenses may, under proper circumstances, be joined in one information; but it must be in separate counts. Each count, as a general thing, should embrace one complete statement of a cause of action, and one count should not include distinct offenses—at least, distinct felonies. There are many prominent exceptions to this rule, but, as this case is not within the exceptions, they need not be noted.

To the same effect is *State v. Gibson*, 111 Mo. 92; *Slocum v. People*, 90 Ill. 274; *Henderson v. People*, 124

Ill, 607. And so, too, even Section 1024 of the Revised Statutes of the United States, which reads as follows:

“When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment, in separate counts.”

I recognize, may it please the Court, that in this day of so-called judicial reform, what I am now contending for, here, seems to be a superlative nicety, but superlative niceties are never quite so vital, nor valuable, as when they are given life for the purpose of protecting innocence from death or the prison; and the facts in this case, though, as I readily recognize, have been passed upon by a jury, must be viewed with an intense rigidity before the defendants can be convicted; hence, they are entitled to the same rigidity in the construction of that which the sovereignty alleges against them. A man who gets \$2,500 and sends that money, together with a letter, to the bank, for which he got it, and afterwards, within a week of the time that he ascertains that a mistake has been made, again pays the money, together with all charges and interest, is not such a very bad man, after all. Surely not a man who should lie in prison five years; and, therefore, in order to save him from such disgrace, when he has

harmed no one, every well-marked path of the law, so marked by judicial ascertainment, should be resorted to and claimed and recognized before punishment is suffered to be pronounced.

I therefore take the liberty of commending to the Court a careful reading of the case of *United States v. Norton*, 188 Fed. 265, which is the first and only case that I have been able to find which deals with the point directly at issue, and wherein a judge of great learning determined the identical point now being discussed in the way that I am now contending and asking that this Court shall determine it.

II.

The court erred in sustaining the action of the lower court, in overruling the plea of jeopardy, because the first indictment was entirely sufficient to have supported a conviction, and because, upon such indictment, the defendants were in jeopardy, and having been in jeopardy once, the Fifth Amendment to the Constitution of the United States protects them from a second accusation, and the case of *Ball v. United States*, 163 U. S. 662, while not on all fours with the case at bar, is an authority for our contention.

To hold otherwise is to permit the prosecuting officer, even after the expense and ordeal of a trial has been suffered by a defendant, to take a non-suit, re-shape his pleadings, and start all over again.

The case of *United States v. Rogoff*, 163 Fed. 312,

cited by your Honors in support of your ruling on this question, was a case somewhat dissimilar from the one at bar, in that the indictment was dismissed by the court before the cause was submitted to the jury, before any testimony was taken, or any argument of counsel was heard. In other words, the jury had merely been sworn and the case opened, while in the first trial of these defendants, all of their dilatory pleas had been passed upon, a jury had been chosen and sworn, all of the testimony had been introduced, and all of the argument of all of the counsel, both for the Government and the defendants, had taken place, save and except the concluding argument of the District Attorney, and also with the further distinction that the cause having thus far progressed and the trial having actually taken place, the defendants demanded that they have a verdict, which the court, of his own motion, denied and refused.

Again, the case cited as authority for the holding of the court is somewhat different in that it is not conceded here that the first indictment was not good. On the contrary, it is maintained that it does state an offense, to-wit, the offense of abstraction. In other words, it is not conceded by the defense that the former indictment was fatally insufficient nor is it conclusively shown by the prosecution that it was so fatally insufficient.

III.

Because the court has overlooked and failed to con-

sider the defendants' sixth assignment of error, wherein it was and is urged, that the trial court failed to charge the jury upon the case as made in the indictment, in that he authorized the jury to convict the defendants, if they believed that the defendants issued the certificate of deposit with intent to injure **or** defraud the bank, because the indictment charged such intents conjunctively and not disjunctively, and the Government having carved in its indictment and charged conjunctively, the court must follow the charge made in the indictment and a degree of proof less than that measured by the indictment would not authorize a conviction.

In other words, the court directed the jury to convict if they found that there was an intent to injure or an intent to defraud, when the indictment charged that the issuing of the certificate was done with the intent to injure and with the intent to defraud, such assignment and argument having been presented in the written brief of the plaintiffs in error, at pp. 48 to 52 inclusive.

IV.

Because the court is in error in sustaining the position of the lower court with reference to the question of venue, because the jurisdiction of the Idaho court was dependent upon the commission of the offense within its territorial limits and since the proof showed that no certificate of deposit was issued in the State of Idaho, the least that the trial court could have done was to have submitted to the jury the special instructions

requested by the defendants wherein the venue, as a question of fact, which it always is, was sought to be left to the jury.

Section 42 of the Judicial Code, which fixes a continuing jurisdiction, only applies when something is begun which is an offense and of course the handling of a blank certificate is not offensive and could not have become so in this case until the money realized therefrom, later on, failed to find its way into the bank's hands, for if it had so found its way, the implied authority of cashier S. D. Simpson was sufficient to have made the entire transaction perfectly lawful and utterly innocent.

V.

Because the court erred in paragraph 4 of its opinion wherein it denied to the defendants the right of ratification by the directors of the bank, placing such denial upon the fact that the doctrine of ratification has little application to the criminal law.

As a general proposition, the doctrine announced by the court is correct, but the trial court denied us the right to prove and denied us the right to have submitted to the jury the facts of this particular case, which would have authorized a ratification, because what was done was not criminal; that is to say, it was the contention of the defendants that cashier S. D. Simpson was issuing certificates of deposit all the time by virtue of his position, without the consent of the directors; that is,

he never, at any time, received their actual consent or agreement to the issuance of any certificate. He issued, therefore, with their implied authority, and when they afterwards found out that he had issued these certificates they were paid and taken care of in due course. He had a right, therefore, to assume that they would act the same way with reference to the certificate in question, and when he sent out a blank certificate for the purpose of securing cheaper funds for the bank, and when, afterward, that certificate came in to the bank, though in the meantime a grave error had been committed, and all of the facts became known to the directors, they then had a right to ratify what he had previously done and such ratification dated back to the time he gave out the blank, say the courts, and made legal and valid that original act. It was these very facts that the trial court refused to permit any testimony upon, and these very facts themselves are the best possible light that could be shed upon the intent of the defendants, a light, by the way, that the hesitation of the jury, all through the hours of the night, and their subsequent seeking for additional instructions from the court, upon the question of intent, shows was most necessary and humane.

In this sense, therefore, it is respectfully submitted, there could have been a ratification.

You see, may it please Your Honors, as soon as the certificate matured, and was returned to the bank for

payment, it was taken by the defendant, S. D. Simpson, to the directors and they recognized it and authorized its payment and thereupon the defendants repaid the bank this amount, together with all interest and charges thereon, and the bank never suffered, nor lost a penny.

VI.

A re-hearing should be granted herein, for the reason that the defendants', plaintiffs in error, twenty-third assignment of error, is well taken.

Inasmuch as the opinion of this Honorable Court discloses that, perhaps the Court thought that, only such errors as were presented orally are relied upon by the plaintiffs in error, it may be that the Court did not consider the assignment above mentioned. The hour granted for oral argument was insufficient in which to speak of all of the claimed errors. Certainly, however, the twenty-third assignment, which treats of the vital question of intent, is not one that was waived by the defendants, nor that should be now considered valueless.

It was solely the question of intent that turned this case. It was upon this question, may it please the Court, that the jury hesitated, and it was with reference to this question that the jury sought additional instructions. The court charged (p. 61, defendants' brief): "It is essential to guilt here, that a wrongful intent must have existed at and prior to the time the certificate was hypothecated in Kentucky" (Rec. p. 84). The defend-

ants requested a charge which in substance required that the jury must believe that there was the intent to injure and defraud at the time the certificate was issued and put forth, and of course the certificate was issued and put forth, if the indictment is to be relied upon, at the time it was handed, in its blank condition, in Idaho, by S. D. Simpson, to W. G. Simpson (Defendants' brief p. 61; Rec. p. 41). A bad intent, in Mississippi, or in Kentucky, would not satisfy the law, and of this position there can be no question whatsoever. And Sec. 1024 R. S. U. S. does not attempt to alter this position.

If, however, the jury had found such bad intent in Kentucky or Mississippi, the facts themselves would make such a finding without testimony, because the letter of W. G. Simpson, as shown in the Record (pp. 127-128) (Defendants' brief pp. 72-73), distinctly advised of the sale of the certificate and tells where the funds should be deposited, which were enclosed therewith, and this letter shows an utterly innocent intent.

The intent in this case is the body and soul of the whole matter, as said by the Supreme Court of the United States, in the Evans case.

VII.

A rehearing should be granted for the reason that the indictment charges no offense, and for the further reason that the court's charge is not responsive to the allegations in the indictment.

In the opinion of this Honorable Court, there is no treatment of that portion of our criticisms which were directed toward the insufficiency of the indictment, because the same alleged a state of facts that could have been true and at the same time could have been entirely innocent. Section 5209 does not require that the one to whom a certificate of deposit is issued shall have on deposit the amount of money called for in the certificate. Section 5209 merely provides that no certificate shall be issued or put forth without the consent of the Board of Directors. An indictment, therefore, which charges the issuing and putting forth of a certificate of deposit to W. G. Simpson when at that time the said W. G. Simpson did not have on deposit with the issuing bank an amount of money equal to the amount specified in the certificate, stated no offense, because, when one deposits money or gives a check, or gives a note for the issuing to him of a certificate of deposit, such check or note or money is not deposited with the bank in his name, nor does he really deposit such funds. He merely passes to the bank such value, which at once becomes the property of the bank, and the bank issues to him an evidence of its indebtedness to him.

In other words, it might have been entirely true, as alleged in the bill, that W. G. Simpson did not, then and there, have on deposit the amount of \$2,500 with the said bank, and yet he might have paid \$2,500 to the bank for the certificate of deposit. The bill, therefore,

upon its face, fails to state an offense, and a reading of the statute and of the indictment, clearly shows this.

This position was clearly set forth in defendants' tenth assignment of error, p. 52 of their brief, and was a ground of their motion to quash and of their demurrers (pp. 23-24), which motion and demurrers the court overruled (pp. 65-66). The language of the indictment is not that W. G. Simpson had not deposited that amount of money, but the language of the indictment is, that he, the said W. G. Simpson, did not, then and there, have on deposit with the said bank the said amount of money.

The trial court recognized that what we now contend for was the correct construction of the statute when he charged the jury (p. 78), but the charge of the court is not in harmony with the allegations of the indictment in this respect.

VIII.

A re-hearing should be granted for the reason that this Honorable Court erred in sustaining the position of the trial court, that it was quite unimportant whether the certificate was issued in blank or not, as complained of in the defendants' fifth assignment of error, p. 41 of their brief.

CONCLUSION.

Where the facts show beyond dispute the guilt of a person accused of crime, courts will be slow in this

day, and of right they should be, to disturb a verdict of guilty; but, where the punishment is as severe as it is in this case, and where the question of punishment or liberty depends upon the intent that nestled in the hearts of the defendants, and which could only be measured by their open, overt acts, and where the jury hesitated, as evidenced by the record in this case, even staying out through all the hours of night and in their uncertainty asking more instructions upon this identical question, and then, finally, after fourteen or fifteen hours of constant deliberation, returning a verdict and recommending, "**most earnestly**," leniency, the closest sort of scrutiny of the trial, of the charge, of the methods, of the rules, and decisions, is not only merited, but demanded in order that injustice may not result.

I therefore sincerely pray for a reconsideration and a re-hearing of this cause.

WILLIAM H. ATWELL,

Attorney for Plaintiffs in Error,

W. G. Simpson and S. D. Simpson.

United States
Circuit Court of Appeals
For the Ninth Circuit.

HENRY HEWITT, Jr.,

Appellant,

vs.

MOUNTAIN HOME CO-OPERATIVE IRRIGATION
COMPANY, a Corporation,

Appellee.

TRANSCRIPT OF RECORD

Filed

MAY 27 1915

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.*

*B. D. Monckton,
Clerk.*

No.

United States
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Irrigation Company.

COMPLAINT.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

HENRY HEWITT, Jr.,

Plaintiff,

vs.

MOUNTAIN HOME CO-OPERATIVE IRRIGATION COMPANY, a Corporation, and GREAT WESTERN BEET SUGAR COMPANY, a Corporation,

Defendants.

Complaint.

Comes now the plaintiff, and for cause of suit against defendants, and each of them, complains and alleges:

1.

That at and during all the several times hereinafter mentioned, plaintiff, Henry Hewitt, Jr., was and now is a citizen and inhabitant of the State of Washington.

2.

That at and during all the several times hereinafter mentioned, defendant, Mountain Home Co-operative Irrigation Company, was and now is a corporation organized and existing under and by virtue of the laws of the State of Idaho, with its principal place of business at Mountain Home, State of Idaho.

3.

That at and during all the several times hereinafter mentioned, defendant, Great Western Beet Sugar

Company, was, and plaintiff believes now is a corporation organized and existing under and by virtue of the laws of the State or Territory unknown to this plaintiff other than the State of Idaho, and was, and plaintiff verily believes now is duly admitted to do business within the State of Idaho under and by virtue of compliance with the laws of the State of Idaho.

4.

That the amount involved in this suit, exclusive of interest and costs, exceeds the sum of \$3,000.00, and that this suit involves the construction of the Fourteenth Amendment to the Constitution of the United States.

5.

That on and prior to the 30th day of January, 1907, defendant, Great Western Beet Sugar Company, was the owner in fee of the certain reservoir and right-of-way therefor, known as the High Prairie Reservoir, intended for the storage of the waters of Lime Creek and other waters; and was likewise the owner in fee of that certain other reservoir known as the Camas Reservoir; and was likewise the owner in fee of that certain other reservoir known as the Long Tom Reservoir, together with all connecting and distributing ditches, canals, laterals, easements, rights-of-way, franchises, and other rights, privileges and appurtenances appertaining to and used, or intended to be used, in connection therewith, or either of them as a reservoir and irri-

gation system, all of which property is more particularly set forth and described in that certain mortgage hereinafter referred to, a copy of which is hereto attached, marked Exhibit "A", and made a part of this complaint in this paragraph by reference thereto.

6.

That on the 30th day of January, 1907, defendant, Great Western Beet Sugar Company, was indebted to plaintiff in the total sum of \$80,000.00, and in order to secure the payment of said total sum, said Great Western Beet Sugar Company, on said day, duly made, executed and delivered to this plaintiff its certain indenture or mortgage covering all of the above described property, which said mortgage secured the payment of various notes theretofore given by defendant, Great Western Beet Sugar Company, to this plaintiff and aggregating said total amount of \$80,000.00, according to the terms, conditions and tenor of said respective notes, which said mortgage was duly attested, witnessed and acknowledged so as to entitle it to be recorded, and which said mortgage was on said 30th day of January, 1907, duly recorded in the office of the County Recorder of Elmore County, State of Idaho, in Book 37 of Mortgages on page 32.

That no part of said notes or mortgage has ever been paid, neither the interest thereon, and that there is now due and owing from said defendant, Great Western Beet Sugar Company, to this plaintiff the total sum of \$80,000.00 principal, with in-

terest on \$35,000.00 from August 1, 1906, to date, interest on the further sum of \$20,000.00 from November 2, 1906, to date, and interest on the further sum of \$25,000.00 from January 30, 1907, to date, all of them at the rate of ten per cent per annum. That said notes and mortgage provide for the payment of an attorney's fee in case of suit, and that the sum of \$10,000.00 is a reasonable amount to be allowed as an attorney's fee for the collection of said notes and the foreclosure of said mortgage.

7.

That on account of the failure of the defendant, Great Western Beet Sugar Company, to pay the said notes and mortgage to the plaintiff herein, plaintiff, on the 4th day of August, 1908, filed a suit in the District Court for the Fourth Judicial District of the State of Idaho in and for Elmore County against the defendant, Great Western Beet Sugar Company, and various other defendants, asking for a decree foreclosing said mortgage.

8.

That before said foreclosure suit was filed or had gone to judgment or decree, the Idaho Fruit Lands Company, Limited, a corporation organized and existing under and by virtue of the laws of New Jersey and duly admitted to do business in the State of Idaho, filed an action in the District Court of the Fourth Judicial District of the State of Idaho in and for Elmore County, against defendant, Great West-

ern Beet Sugar Company, and others, which action was brought to determine the interest of said Idaho Fruit Lands Company, Limited, in and to the irrigation systems of the Great Western Beet Sugar Company, and that thereafter, to-wit: on the 18th day of March, 1908, the said Court appointed one certain Norman Isaachson as Receiver in said cause, which said action was filed after this plaintiff had duly recorded his said mortgage, and after the lien of said mortgage had attached to the property hereinbefore described.

That thereafter said cause came duly on for trial upon the merits and said District Court decided that the Idaho Fruit Lands Company, Limited, plaintiff in said suit, had no interest in the irrigation system of the Great Western Beet Sugar Company, and rendered its decision in favor of the defendant, Great Western Beet Sugar Company, which decree, having been likewise appealed to the Supreme Court of the State of Idaho, was thereafter, to-wit, on the 11th day of March, 1910, affirmed by said Supreme Court, said decision being reported in Vol. 18, Idaho Reports on page 1.

That although plaintiff herein, Henry Hewitt, Jr., was at the time of the institution of said suit by the Idaho Fruit Lands Company, Limited, against defendant, Great Western Beet Sugar Company, a lien holder prior in time, plaintiff, Henry Hewitt, Jr., was neither made a party to that suit, nor served with notice or process therein, nor did he have knowledge of the institution or pendency of said suit.

That while said Norman Isaachson acted as such Receiver in said cause wherein Idaho Fruit Lands Company, Ltd., was plaintiff, and the Great Western Beet Sugar Company and others, defendants, he issued Receiver's certificates to the amount of \$17,675.00, and thereafter, to-wit: on the 28th day of October, 1909, filed his final account as said Receiver and before the said Receiver's certificates were paid, said Norman Isaachson was discharged by said Court from the duties and obligations as such Receiver. That said certificates were given to various parties who did not give notice to this plaintiff, either judicially or otherwise, that they were the holders of said certificates, or claimed, or pretended to claim, priority to the mortgage of this plaintiff.

That by failure of the Idaho Fruit Lands Company, Limited, to make Henry Hewitt, Jr., a party in that certain case wherein the said Receiver's certificates were issued by said Norman Isaachson, he, the said Henry Hewitt, Jr., plaintiff herein, was prevented from attacking their validity or priority, and such certificates plaintiff verily believes were excessive, false, fraudulent and padded, and issued for illegal claims which had no existence in law or in fact, and which were issued by said Receiver as a result of an illegal conspiracy with said parties in whose favor said certificates were drawn, and many of the obligations paid by said certificates were incurred by reckless and indifferent management on the part of said Receiver.

9.

That in the suit wherein Henry Hewitt, Jr., was plaintiff and Great Western Beet Sugar Company, *et al*, defendants, asking for the foreclosure of the above described mortgage, numerous cross complaints were filed by lien holders and others, and on the 21st day of July, 1910, said District Court decreed that said mortgage be foreclosed and Henry Hewitt, Jr. have judgment against the Great Western Beet Sugar Company, in the sum of \$109,275.00 and that the lien of the judgment re-date back to the 30th day of January, 1907, which date was fixed as its date of priority. That said decree fixed and declared the following liens to be prior to the mortgage lien of Henry Hewitt, Jr., which priority plaintiff now and always has admitted:

Balphor Query—April 21, 1905	\$6180.10
Earl Rounds—June 1, 1906	1553,77
Pilgrem and Stafford—October 16, 1906	
.....	2647.90
E. Fisk—November 1, 1906	243.50
James Ladd—November 1, 1906	361.88
Wm. Gastel—November 1, 1906	212.12
Knute Knudson—November 1, 1906 . . .	287.80
John Bollman—November 16, 1906 . . .	98.90
S. Strom—November 16, 1906	204.66

10.

That although the validity or priority of said Receiver's certificates, amounting to said sum of \$17,675.00 so issued by said Norman Isaachson as Receiver, all as aforesaid, in said suit wherein the Ida-

ho Fruit Lands Company, Ltd., was plaintiff, and defendant, Great Western Beet Sugar Company and others were defendants, was not made an issue in the pleadings in said foreclosure suit of Henry Hewitt, Jr. against the Great Western Beet Sugar Company and others, and although the validity and priority of said Receiver's certificates were not raised during the trial of said foreclosure suit, said District Court, who was trying said cause, on its own motion and acting thru one E. A. Walters, its duly elected, qualified and acting judge, wrongfully, unlawfully, and in excess of the jurisdiction and in deprivation of the rights of this plaintiff, held, in its written opinion and decree duly filed in said cause and court, among other things, that said Receiver's certificates so issued by Norman Isaachson as such Receiver in that certain cause wherein Idaho Fruit Lands Company, Ltd., was plaintiff and Great Western Beet Sugar Company was defendant, were, and declared such Receiver's certificates to be a prior lien to all other liens against said property including said \$80,000.00 mortgage so held by this plaintiff, for the foreclosure of which said suit brought.

That plaintiff, Henry Hewitt, Jr., duly appealed from said decree of foreclosure to the Supreme Court of the State of Idaho, urging, among other grounds of said appeal, that certain finding of fact number 149 and that certain conclusion of law number 35, copies of which are hereto attached, marked respectively Exhibits "B" and "C", and which are hereby made a part of this complaint, declaring said Re-

ceiver's certificates of said Norman Isaachson, amounting to said sum of \$17,675.00 all as aforesaid, a first and prior lien to the mortgage of this plaintiff, was illegal and void for the reason and on the ground that plaintiff, Henry Hewitt, Jr., was neither made a party to the suit wherein said certificates were issued nor served with notice or process therein, although he was at the time of the institution of said suit a lien holder of record against the property of defendant, Great Western Beet Sugar Company, and on the further ground that said decree declaring said certificates to be prior liens to said mortgage without giving this plaintiff a chance or opportunity to contest the validity or priority thereof was in contravention of the constitution of the United States and of the constitution of the State of Idaho, and particularly of said parts thereof declaring that no property shall be taken without due process of law, and that said action of said Court declaring said certificates to be a prior lien to said mortgage was depriving this plaintiff of his due rights and amounts to a taking of the rights and property of this plaintiff without due process of law, all in violation of said Federal and State constitutions, all as aforesaid. That said decree so making and declaring said certificates to be a prior lien, was and is utterly void, illegal and without effect against this plaintiff, lacking jurisdiction of the subject matter and over the person of this plaintiff, all as more fully hereinafter alleged and set forth.

11.

That said cause, decreeing said mortgage to be foreclosed, and said Receiver's certificates to be prior liens to said mortgage, coming on to be heard on appeal of this plaintiff before the Supreme Court of the State of Idaho, said Supreme Court, on the 26th day of September, 1911, affirmed the decree and findings of said District Court, said decision being reported in Vol. 20, Idaho Reports on page 235, which said decision, attempting to affirm a void decree, is likewise illegal, null, void and of no effect and not binding upon this plaintiff.

12.

That after said Supreme Court of Idaho had affirmed said decision of said District Court in said suit of Henry Hewitt, Jr. praying for the foreclosure of his said mortgage, said District Court made and entered an order directing the property covered by said mortgage to be sold by O. E. Cannon, the then Receiver in said cause, whereupon plaintiff, Henry Hewitt, Jr., duly petitioned the Supreme Court of the State of Idaho for a writ prohibiting said sale on the grounds theretofore alleged, which said petition, upon a hearing in said Supreme Court, was, on the 19th day of December, 1911, refused by said Court, which said decision is reported in Vol. 21 of Idaho Reports, on page 1.

13.

That thereafter, to-wit: on the 5th day of Janu-

ary, 1912, said O. E. Cannon, as such Receiver, offered said property for sale in compliance with said void and illegal decree of foreclosure, all as heretofore alleged, and that at the day and hour of sale one certain L. G. Bradley attended and wrongfully, fraudulently and wickedly, and without any authority or right or direction whatsoever from this plaintiff, represented himself to be the agent and representative of this plaintiff, and then and there wrongfully, unlawfully and fraudulently pretended to have authority from this plaintiff to bid on his behalf at said public sale. That this plaintiff, having been advised by his counsel that said attempted decree of foreclosure was null, void, illegal, and of no effect, refused to recognize the authority of said Receiver to sell said property, and refused to attend said sale, or to be represented at said sale, or to directly or indirectly bid at said sale, in order to avoid such attendance or taking part in the proceedings at such attempted sale to be construed as giving his assent or consent to said illegal sale, or of having waived his rights to question the validity of said pretended sale.

That at said attempted sale, the property heretofore described was strick off to one Harry Watkins for the total sum of \$56,546.79; and that although the Court had ordered that the sale be for cash, no money was actually paid by said Harry Watkins until the 10th day of February, 1912, when \$14,-136.95 was paid, and on the day of 1912, the balance was paid. That although the pro-

perty attempted to be sold was then fully worth upwards of \$500,000.00, and although the amount of the total liens and Receiver's certificates came to the total sum of \$214,585.97 and although the Court had fixed the minimum bid to be \$56,546.79, said Harry Watkins, wrongfully, unlawfully and illegally conniving and conspiring with said O. E. Cannon, the then Receiver in said cause, to illegally, wrongfully and unlawfully deprive this plaintiff of his right, title and interest in and to the property covered by his said mortgage and attempted to be so sold, and to wrongfully, unlawfully and fraudulently extinguish the lien of this plaintiff against the property so mortgaged and so attempted to be sold, bid in said property for the total amount of the liens and Receiver's certificates by said Court adjudged to be the minimum bid and prior lien to the notes and mortgage of this plaintiff carefully and studiously avoiding bidding or paying of any sum or sums of money in excess of said prior liens and Receiver's certificates in order to avoid said balance being paid to this plaintiff; and that said Harry Watkins and said O. E. Cannon, in pursuance of such wrongful and unlawful connivance and conspiracy, and by a common design and understanding, stifled the competition at such sale and purposely and intentionally kept prospective bidders away from said sale in order to purchase said property, as plaintiff is informed and verily believes, for one certain James H. Brady at their own figure and without competition.

That said minimum bid and amount brought at said Receiver's sale was excessively low and wholly and entirely disproportionate and inadequate to the true value of the property, and made solely for the purpose of paying the Receiver's certificates and liens prior to Henry Hewitt, Jr., in utter disregard and in violation of the rights of this plaintiff and not for the purpose of bringing payment to Henry Hewitt, Jr. of his mortgage, although he was the plaintiff in said foreclosure suit and the largest of all creditors.

14.

That Henry Hewitt, Jr. duly objected to the confirmation of the said pretended Receiver's sale among others, upon the identical grounds urged in his appeal to the Supreme Court of Idaho in his foreclosure suit and in his petition for a writ of prohibition, more specifically set forth in Paragraph 10 of this complaint, to which reference is hereby made, and on the further ground that said sale was a taking of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. That the said District Court overruled the objections of Henry Hewitt, Jr. to the confirmation of the said pretended sale, whereupon this plaintiff duly appealed to the Supreme Court of the State of Idaho, which said Supreme Court, upon a hearing of said cause, affirmed the order of the District Court confirming said attempted sale on the 15th day of July, 1912, which decision is likewise reported in Vol. 22, Idaho Reports, page

328. That said decision, affirming an order of confirmation of an illegal sale, is likewise null, void and of no effect, and not binding upon this plaintiff.

15.

That the judgment and decree of said District Court, and particularly finding of fact 149 and conclusion of law 35, declaring the certificates issued by Norman Isaachson as Receiver in a case wherein this plaintiff, Henry Hewitt, Jr., was neither a party nor had been served with notice or process in said cause, to be a prior lien to the mortgage of this plaintiff, was and constitutes a taking of plaintiff's property in that said mortgage without due process of law as the said District Court, lacking jurisdiction of this plaintiff and over the subject matter therein without the service of process on this plaintiff, could not render a valid or binding decree against this plaintiff taking from this plaintiff his priority and property rights secured to him by virtue of the acts of the parties and the said certain mortgage; and that said pretended decree so rendered by said Court aforesaid, was and is null, void and of no effect and not binding upon this plaintiff.

16.

That said certain judgment and decree of the District Court in the foreclosure suit wherein Henry Hewitt, Jr. was plaintiff and the Great Western Beet Sugar Company was defendant, wherein that Court decreed that those certain Receiver's certificates issued by said Norman Isaachson, the then Re-

ceiver of the said Great Western Beet Sugar Company, be a prior lien to the lien of the mortgage of this plaintiff, was and is null, void and of no effect and is not binding upon this plaintiff in that it attempts to take and does take from this plaintiff his property in that certain mortgage heretofore mentioned, and the property mortgaged thereby, without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States, said Court being without power to render a decree foreclosing the mortgage upon said property and inserting on its own motion an issue neither raised in the pleadings nor at the trial of said cause and constituting part of the judgment and decree in a cause to which this plaintiff was neither a party nor had been served with notice or process in said cause.

17.

That all of the acts, matters and things heretofore alleged, to which reference is hereby made, constitute and are taking of the property of this plaintiff in the mortgage above described and in the property covered thereby in violation and contravention of the Fourteenth Amendment to the Constitution of the United States.

18.

That all the liens prior to that of the mortgage of the plaintiff herein were paid out of the proceeds of said sale, but the lien of this plaintiff accruing to him by virtue of said mortgage has never been fore-

closed or extinguished, and ever since has been and is a valid and existing and first and prior lien upon the property, and every part and parcel thereof, heretofore more particularly described, and that the pretended purchaser, Harry Watkins, if he acquired any rights whatsoever under such pretended sale, acquired said property with full notice of all the facts heretofore alleged and with full notice and subject to the prior existing lien of this plaintiff amounting to \$80,000.00, together with interest, attorney's fees and costs, as more fully heretofore alleged.

19.

That said Harry Watkins, the pretended purchaser, at the so-called Receiver's sale, did thereafter, on the 9th day of April, 1912, transfer the property covered by said mortgage herein to one certain James H. Brady, which transfer is recorded in Quit Claim Deed Records 19, page 508, Elmore County, Idaho, which said transfer to said James H. Brady was made by quit claim deed, said James H. Brady having, at the time of such transfer and long prior thereto, a full and complete knowledge of all the facts alleged in this complaint, and was fully and thoroughly acquainted and familiar with all of the alleged illegal and void judgments, and all of said alleged illegal and unlawful connivance and conspiracy existing between said O. E. Cannon, Receiver, and Harry Watkins, pretended purchaser; said Harry Watkins having been the agent and representative at said pretended sale and at other times of said James H. Brady.

That thereafter, on the 22nd day of May, 1912, said James H. Brady attempted to and did transfer said property above described to one of the defendants herein, Mountain Home Co-operative Irrigation Company, which said company is a corporation of the State of Idaho as heretofore alleged, and in which said corporation said James H. Brady was and plaintiff verily believes now is, the principal and controlling stockholder, said transfer having likewise been made merely by a quit claim deed and being recorded in Quit Claim Deed Record 19, page 573; said defendant, Mountain Home Co-operative Irrigation Company, a corporation, having likewise full knowledge of all the facts alleged in this complaint, and was fully and thoroughly acquainted and familiar with all of the alleged illegal and void judgments and all of said alleged illegal and unlawful connivance and conspiracy existing between said O. E. Cannon, Receiver, and Harry Watkins, pretended purchaser.

20.

That the plaintiff herein has exhausted all his remedies, both in the courts of law and equity, in the State of Idaho and said courts have failed, neglected and refused to grant to this plaintiff any relief whatsoever in the premises; that his present situation is not due to his own neglect or carelessness, and that he would have filed this suit long prior hereto had he not been engaged in investigating the facts and the law applicable to and in this suit, and that he did not at any time consent, but to the contrary at

all times vigorously objected to the rendition of said judgments and decrees and to the illegality and invalidity thereof; and that unless assisted by this Court, this plaintiff will never receive one cent in payment of the notes and mortgage so given to him by defendant, Great Western Beet Sugar Company, the consideration of which was an actual cash loan.

21.

That as plaintiff is informed and verily believes, defendant, Mountain Home Co-operative Irrigation Company, is about to mortgage and bond the property covered by this mortgage in the amount of One Million Dollars, or otherwise encumber said property.

22.

That this plaintiff has no plain, speedy or adequate remedy at law in the premises, and unless assisted by this Court will suffer irreparable loss and damage.

Wherefore, this plaintiff prays this honorable Court:

(a) For a decree declaring the judgment of the District Court foreclosing said mortgage, and the judgment of the Supreme Court of the State of Idaho affirming said decree, to be null and void and of no effect and not binding upon this plaintiff;

(b) For a decree vacating and setting aside the attempted sale by said Receiver to said Harry Watkins of said property, hereinbefore described, and

decreeing said attempted sale to be null, void and of no effect and not binding upon this plaintiff;

(c) For a decree that the mortgage hereinbefore described be declared a first and prior lien upon the property covered by the said mortgage, and that the right, title and interest of the said Mountain Home Co-operative Irrigation Company, if any, in said property be declared to be subsequent and subject to the lien of plaintiff's mortgage upon said property;

(d) For a decree foreclosing said mortgage heretofore described, together with interest, attorney's fees and costs from the dates specified in this complaint;

(e) For a decree that the present pretended owner, Mountain Home Co-operative Irrigation Company, a corporation, be enjoined from selling, conveying, transferring, mortgaging, encumbering, hypothecating, bonding, or otherwise disposing of said property until the further order of this Court;

(f) For a decree that the property be advertised and sold as upon execution and the proceeds from said sale be applied: First, to the payment of said mortgage, together with attorney's fees, costs and interest; and the balance, if any there be, to be paid as this Court may direct; that the plaintiff may become a purchaser at said sale, and that the purchaser, after the confirmation of said sale, be let into the immediate possession of said property;

(g) And for such other and further relief as this

Court may deem meet and equitable, and for the costs of suit.

LEON W. BEHMAN,

FRANK C. HESSE,

Attorneys for Plaintiff, 413-414 Selling Bldg.,
Portland, Oregon.

State of Washington,
County of Pierce,—ss.

I, Henry Hewitt, being first duly sworn, depose and say: That I am the attorney in fact for Henry Hewitt, Jr., the plaintiff in the above entitled cause; and that the foregoing complaint is true as I verily believe.

HENRY HEWITT.

Subscribed and sworn to before me this 16th day of April, 1914.

GEO. E. DIXON,

Notary Public for Washington.

My commission expires: October 19, 1917.

EXHIBIT "A".

Mortgage.

This Indenture, made this 30th day of January in the year of our Lord, Nineteen Hundred and Seven (1907), between the *Great Western Beet Sugar Company*, a corporation, organized, incorporated and existing under and by virtue of the laws of the State of Washington, with its principal office at Seattle, Kings County, State of Washington, doing business as such in the County of Elmore, State of

Idaho, party of the first part, and Henry Hewitt, Jr. of Tacoma, Washington, the party of the second part.

Witnesseth: That the party of the first part, for and in consideration of the sum of Eighty Thousand (\$80,000.00) Dollars, gold coin of the United States of America to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part and to his heirs and assigns, forever, all of the following described real property, rights, franchises and easements, situated, lying and being in the County of Elmore, State of Idaho, and more particularly described as follows, to-wit: That certain irrigation, canal and reservoir system at and near Mountain Home, Idaho, and known as the Mountain Home, Long Tom and Camas Prairie Reservoir and Canal System, including all dams, ditches, tunnels, flumes, viaducts, reservoirs and canals of the party of the first part now built, building or to be hereafter built, constructed or acquired, being and including the Little Camas Creek Water right and reservoir locations made by the Great Western Beet Sugar Co., October 25th, 1902, and recorded October 27th, 1902, in book eighteen (18) of Water Rights at page one hundred and twelve (112); and Wood Creek water right location, made by the Great Western Beet Sugar Co., October 25th, 1902, and recorded October 27th, 1902, in book eighteen (18) of Water Rights at page one hundred thirteen (113); Lime Creek

water right location made by the Great Western Beet Sugar Co., October 25, 1902, and recorded on said date in book eighteen (18) at page one hundred fourteen (114); Cat and Camas Creek water right locations made by Daniel W. Greenburg, April 13th, 1902, and recorded April 14, 1902, in book thirteen (13) of Water Rights at page seventy-nine (79); Long Tom and Willow Dale Creeks and Long Tom reservoir site, water and reservoir locations made by Samuel G. Rhodes, September 13th, 1900, and recorded September 18th, 1900, in book seventeen (17) of Water Rights at page six hundred thirty-seven (637), Records of Elmore County, Idaho; and that certain reservoir and reservoir site now held and controlled by it, located two miles north of said village of Mountain Home in said County and State; said reservoir being situate in Sections 8, 17, 18, and 19, in Township 3 south, Range 7 east of Boise Principal Meridian, and also all of its rights, title and interest in and to a certain right of the party of the first part to use the flood waters from all the country tributary and adjacent to said reservoirs, also the right to convey water through the channel of Rattlesnake Creek, in said County and State, and all of its right, title and interest in and to all distributing canals, laterals, flumes, and ditches constructed for the purpose of irrigating lands, situate in and about the said village of Mountain Home in said County and State; also all of its rights, title and interest in and to a certain supply canal connected with the channel of Canyon Creek, near the northeast corner of Section 35, in Township 2 south,

Range 6 east; thence running through Section 36 in said Township; and thence running through Section 31, 6, 7, 8, in Township 3 south, Range 7 east of Boise Principal Meridian, also all its right, title and interest in and to the right of said first party to use the channel of Canyon Creek from the head of its supply canal above described, to the head of said creek for the purpose of conveying water for irrigation purposes; and all the right, title and interest of the said first party in and to the waters of Canyon Creek; also all the right, title and interest of the first party in and to a certain storage reservoir and reservoir site, the dam of which is situated near the southeast corner of Section thirty-six in Township 1 south, Range 8, east of Boise Principal Meridian, in said County and State, which said reservoir and sites are generally known as the Long Tom Reservoir; also all of the right, title and interest of said first party in and to a certain grant or right-of-way to build, construct, operate and maintain a canal from the head of Long Tom Creek, in said Elmore County, Idaho, commencing in Section 22, Township 1 south, Range 4 east, in said County and State, and running through Sections 15, 14, 23, 24, and 25, in said Township, and through Sections 30, 19, 18, 17, 8, and 9 in Township 1 south, Range 9 east; also all of its right, title and interest in and to that certain reservoir site and dam known as Camas Prairie Reservoir, situated in Township 1 south, Range 9 east, and also all the right, title and interest of said first party, in and to all of its certain water rights

and water right locations, made either by itself or its agents on its behalf, and such water rights and water right locations as have been made or obtained by others and assigned to it on Little Camas Creek, Lime Creek and High Prairie, which water right locations include the location made by Daniel B. Horton on Camas Creek on March 19, 1901, and recorded in the office of recorder in and for Elmore County, Idaho, in Book 18 of Water Rights, page 18; the water right location of S. G. Rhodes on Cat Creek, made June 27, 1901, and recorded in the office of recorder in and for Elmore County, Idaho, in Book 18 of Water Rights on page 29, and the following water right locations on Cat and Camas Creeks, in said Elmore County, Idaho, made by D. W. Greenburg, to-wit: October 19, 1901, recorded in Book 18, Water Rights at page 44; location of December 16, 1901, recorded in Book 18 of Water Rights on page 62; location of February 15, 1902, recorded in Book 18 of Water Rights, page 67; location of April 13, 1902, recorded in Book 18 of Water Rights at page 87, all being recorded in the office of recorder in and for Elmore County, Idaho; the water rights location of Samuel G. Rhodes on Little Camas Creek made May 13, 1897, recorded in Book 17 of Water Rights at page 350; the location of Samuel G. Rhodes on Little Camas Creek, made on October 14, 1897, and recorded in Book 17 of Water Rights at page 393; the location of Daniel B. Horton made March 29, 1901, on Lime Creek and recorded in Book 18 of Water Rights at page 15; location of Daniel B. Horton, on Little Camas Creek,

made March 29, 1901, and recorded in Book 18 of Water Rights at page 20; the water right location of S. G. Rhodes on Lime Creek, made June 27, 1901, and recorded in Book 18 of Water Rights at page 32; the water right location of Great Western Beet Sugar Co. on Little Camas Creek, made October 27, 1902, and recorded in Book 18 of Water Rights at page 112; the water right location of Great Western Beet Sugar Co. on Lime Creek, made October 27, 1902, and recorded in Book 18 of Water Rights at page 114; and the water right location of S. G. Rhodes on Lime Creek made January 28, 1903, and recorded in Book 18 of Water Rights at page 122; all of which said locations are recorded as above set forth in the office of the recorder in and for Elmore County, Idaho, together with all water rights, permits and franchises now held and owned by said first party, acquired either from the State of Idaho, or from the United States to build, operate and maintain the canals and reservoirs herein described; also all of the right, title and interest of said first party in and to all water right locations, surveys, right-of-way, plans and specifications for such canal system, together with all timber and other material to be used in the construction of said system, now owned or held by said first party, together with all rights, title, interest in and to all leases, franchises, grants, easements, stocks, bonds, and other evidences of ownership, and all right, title, interest of the party of the first part in and to the Mountain Home Storage Reservoir and Canal System in Elmore County, Idaho, formerly the property of the Mountain Home

Land and Canal Company; together with all other water and water rights, canals and canal rights, reservoir and reservoir sites, dams and dam sites, laterals, flumes, viaducts, rights, contracts, easements, and franchises of every kind, nature and description, owned or controlled by the party of the first part in Elmore County, State of Idaho, together with the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining.

To Have and to Hold same, together with all appurtenances unto the second party, his heirs and assigns forever.

This grant is intended as a mortgage to secure the payments of eight (8) certain promissory notes, executed and delivered by the said Great Western Beet Sugar Co. to the said party of the second part, which said notes are described in words and figures as follows, to-wit:

\$10,000.00

Tacoma, Washington, Nov. 2, 1906.

One year after date, I promise to pay to Henry Hewitt, Jr., or order, Ten Thousand and No-100 Dollars for value received, with interest payable annually at the rate of ten per cent per annum from date until fully paid.

GREAT WESTERN BEET SUGAR CO.,

JOHN H. GARRETT, Secy. & Treas.

\$8,750.00

Tacoma, Washington, Aug. 1, 1906.

One year after date I promise to pay to Henry

Hewitt, Jr., or order, Eight Thousand, Seven Hundred and Fifty Dollars, for value received, with interest payable annually at the rate of ten per cent per annum from date until fully paid.

GREAT WESTERN BEET SUGAR CO.,

J. E. JEROME, First V. Pres.

JOHN H. GARRETT, Secy. & Treas.

\$8,750.00

Tacoma, Washington, Aug. 1, 1906.

One year after date I promise to pay to Henry Hewitt, Jr., or order, Eight Thousand, Seven Hundred and Fifty Dollars for value received, with interest payable annually at the rate of ten per cent per annum from date until paid.

GREAT WESTERN BEET SUGAR CO.,

J. E. JEROME, First V. Pres.

JOHN H. GARRETT, Secy. & Treas.

\$8,750.00

Tacoma, Washington, Aug. 1, 1906.

Eighteen months after date we promise to pay to Henry Hewitt, Jr., or order, Eight Thousand, Seven Hundred and Fifty Dollars for value received, with interest payable annually at the rate of ten per cent per annum from date until fully paid.

GREAT WESTERN BEET SUGAR CO.,

J. E. JEROME, First V. Pres.

JOHN H. GARRETT, Secy. & Treas.

\$10,000.00

Tacoma, Washington, Nov. 2, 1906.

Eighteen months after date, I promise to pay to Henry Hewitt, Jr., or order, Ten Thousand and

No-100 Dollars for value received, with interest payable annually at the rate of ten per cent per annum from date until fully paid.

GREAT WESTERN BEET SUGAR CO.,

JOHN H. GARRETT, Secy. & Treas.

\$8,750.00

Tacoma, Washington, Aug. 1, 1906.

Two years after date I promise to pay to Henry Hewitt, Jr., or order, Eight Thousand, Seven Hundred and Fifty and No-100 Dollars for value received, with interest payable annually at the rate of ten per cent per annum from date until fully paid.

GREAT WESTERN BEET SUGAR CO.,

J. E. JEROME, First V. Pres.

JOHN H. GARRETT, Secy. & Treas.

\$15,000.00

Mountain Home, Idaho, Jan. 30, 1907.

One year after date, without grace, I promise to pay to the order of Henry Hewitt, Jr., at Tacoma, Washington, Fifteen Thousand and No-100 Dollars, in gold coin of the United States of America, of the present standard value, with interest thereon in like gold coin at the rate of ten per cent per annum from date until paid, for value received. Interest to be paid annually and if not paid, the whole sum of both principal and interest to become due and collectible at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, I promise and agree to pay in addition to the costs and disbursements provided by statute, such additional sum, in like gold

coin, as the Court may adjudge reasonable, for attorney's fees to be allowed in said suit or action.

GREAT WESTERN BEET SUGAR CO.,

JOHN H. GARRETT, Secy. & Treas.

\$10,000.00

Mountain Home, Idaho, Jan. 30, 1907.

Eighteen months after date, without grace, I promise to pay to the order of Henry Hewitt, Jr., at Tacoma, Wash., Ten Thousand and No-100 Dollars, in gold coin of the United States of America, of the present standard value, with interest thereon in like gold coin at the rate of ten per cent per annum from date until paid, for value received. Interest to be paid annually, and if not so paid the whole sum of both principal and interest to become immediately due and collectible, at the option of the holder of this note. And in case suit or action is instituted to collect this note or any portion thereof, I promise and agree to pay, in addition to the costs and disbursements provided by the statute, such additional sum in like gold coin, as the Court may adjudge reasonable, for attorney's fees to be allowed in said suit or action.

GREAT WESTERN BEET SUGAR CO.,

JOHN H. GARRETT, Secy. & Treas.

And these presents shall be void, if such payments are made. But in case default is made in the payment of such principal sums of money or any of them, or any part thereof, as provided in said notes, or if the interest be not paid, as therein specified, then and thereafter it shall be optional by the party of the second part, his executors, administrators or

assigns, to consider the whole of said principal sums expressed in said notes, as immediately due and payable, although the time expressed in said notes for the payment thereof shall not have arrived; and immediately to enter into and upon all and singular and above described premises, and to sell and dispose of the same, and all benefit and equity, or redemption of the said party of the first part, its successors or assigns, according to law, and out of the money arising from such sale to obtain the principal and interest which shall then be due on such promissory notes, together with the costs and charges of foreclosure suit, including reasonable attorneys' fees; and also the amounts of all such payments of taxes, assessments or incumbrances as may have been by the party of the second part, his executors, administrators or assigns, by reason of the permission hereinafter given, with interest on the same hereinafter allowed, rendering the overplus of the purchase price, if any there be, to the said Great Western Beet Sugar Co., party of the first part, its successors or assigns, and the said party of the first part does hereby further covenant, promise and agree to and with the said second party, to pay and discharge at maturity, all such taxes or assessments, liens or other incumbrances now subsisting or hereinafter, to be laid or imposed on said premises or which may be in effect prior to these presents, during the continuance thereof and in default thereof the said party of the second part may pay and discharge the same and the sums so paid shall bear interest at the rate of ten per cent per annum until paid,

and shall be secured by these presents and be a lien upon such premises and shall be deducted from the sale thereof above mentioned with interest as herein provided. It being expressly provided that time and exact performance of all the conditions herein is of the essence of this contract. And the party of the first part for itself and its successors and assigns, covenants to and with the party of the second part, his heirs or assigns, administrators and executors forever, and to and with any person or persons who may purchase said premises at any sale made under foreclosure of this mortgage; That the party of the first part is lawfully seized in fee simple of the premises hereby conveyed except the Mountain Home Storage Reservoir Canal and has good right to mortgage and same as aforesaid. That the premises are free and clear from all encumbrances; that it will and its successors and assigns shall forever warrant and defend the title of said premises against all lawful claims and demands of all persons whomsoever.

That it is hereby understood and agreed and that it is not the intention of the mortgage to make any change herein which would constitute usury and if the aggregate of everything paid herein shall constitute usury, it is agreed that the excess over the maximum rate shall not be charged or collected.

In Witness Whereof, The Great Western Beet Sugar Co., in pursuance of the by-laws of said company and in pursuance of a resolution of the Board of Directors, has duly caused these presents to be

signed by its Secretary and Second Vice-President and its corporate seal to be affixed this 30th day of January, A. D. 1907.

GREAT WESTERN BEET SUGAR CO.,
JOHN H. GARRETT, Secretary,
FRED B. DANIELS, Second Vice-President.
(Seal.)

Executed in the presence of:

SEYMOUR H. BELL,
J. DENNISON WATTS.

State of Idaho,
County of Elmore,—ss.

Be It Remembered that on this 30th day of January, A. D. 1907, before me, the undersigned, a Notary Public in and for said County and State, duly commissioned and qualified, personally came Fred B. Daniels, second vice-president of the Great Western Beet Sugar Co., and John H. Garrett, as secretary of the Great Western Beet Sugar Co., whose names are subscribed to the foregoing instrument as parties thereto, and the second vice-president and secretary of said company, both personally known to me to be the individuals described in the foregoing instrument, acknowledged to me that he, Fred B. Daniels, as second vice-president, and he, the said John H. Garrett, as secretary of the Great Western Beet Sugar Co., executed the foregoing instrument as and for the free act and deed of the Great Western Beet Sugar Co., freely and voluntarily, and he the said John H. Garrett, being by me duly sworn did depose and say that he is the secre-

tary of the Great Western Beet Sugar Co. and resides at Mountain Home, Elmore County, State of Idaho, that he is the legal custodian and has in his possession the seal of the Great Western Beet Sugar Co. and that the seal affixed to the foregoing instrument is the corporate seal of the company and was affixed by him as secretary of said company on the 30th day of January, 1907, A. D., by order of the Board of Directors of said company.

In Witness Whereof, I have hereunto set my hand and official seal this the day and year first above written.

J. D. WATTS,

(Seal.)

Notary Public, Elmore Co.

State of Idaho,

County of Elmore,—ss.

I hereby certify that this instrument was filed for record at request of Henry Hewitt, Jr., at 31 minutes past 5 o'clock p. m. this 30th day of January, A. D. 1907, in my office.

F. C. SMITH,

Ex-officio Recorder,

By J. A. Siffert, Deputy.

EXHIBIT "B".

Finding of Fact No. 149.

That on the 18th day of March, 1909, this Court made an order appointing Norman Isaachson, receiver in that certain action pending in the District Court of the Fourth Judicial District of the State

of Idaho, in and for Elmore County, wherein the Idaho Fruit Lands Co., Limited, was plaintiff, and the Great Western Beet Sugar Company and the Elmore County Irrigated Farms Association were defendants, for the care, preservation, protection and repair of the same property which is in issue in the case at bar, known as the canal system of the Great Western Beet Sugar Company; and in the same order, and also in the supplemental order dated April 15th, 1909, in the same cause, directed and authorized said receiver to issue receiver's certificates to pay the necessary expenses for the maintenance, repair and protection of said property; and on the 28th day of October, 1909, said receiver filed his final account, showing that he had issued certificates in the sum of \$17,675.00, and said account was, without objection, after due notice to all parties, approved, settled and allowed by this Court, and said receiver thereupon discharged. This Court, in said orders authorizing the issuance of said certificates, made the same a first and prior lien on all the property in his charge, and being the same property in issue here and superior to all mortgages, judgments, liens and other incumbrances existing against the same.

EXHIBIT "C".

Conclusion of Law No. 35.

That all of the Receiver's certificates issued by said Norman Isaachson, Receiver, in said action of the Idaho Fruit Lands Company, Limited, against

the Great Western Beet Sugar Company, *et al.*, are first liens and have priority over all other liens herein decreed and shall be first paid before any of the same out of the proceeds of the sale of the property herein involved.

Endorsed: Filed April 30th, 1914. A. L. Richardson, Clerk.

MOTION TO DISMISS.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

HENRY HEWITT, Jr.,

Plaintiff,

vs.

MOUNTAIN HOME CO-OPERATIVE IRRIGATION COMPANY, a Corporation, and GREAT WESTERN BEET SUGAR COMPANY, a Corporation,

Defendants.

Motion.

Comes Now the defendant herein, Mountain Home Co-operative Irrigation Company, a corporation, by W. C. Howie, L. L. Sullivan and W. E. Sullivan, its solicitors, and moves the Court to dismiss the Bill of Complaint herein for the following reasons, to-wit:

1. That said complaint shows upon its face that this Court has no jurisdiction of the subject matter of the cause of action therein set forth.

2. That this Court has no jurisdiction to hear,

determine or decree as to the validity of the judgment of the District Court of the Fourth Judicial District of the State of Idaho, in and for Elmore County, foreclosing the mortgage mentioned in said complaint or the judgment of the Supreme Court of the State of Idaho affirming said judgment or to vacate, annul or avoid the same, or either thereof, or the sale made thereunder by said Receiver to said Harry Watkins; Nor has this Court any jurisdiction to now hear, determine or decree as to said mortgage being the first or prior lien upon the property covered by said mortgage or that the right, title and interest of this defendant is subsequent to or subject to the alleged lien of plaintiff's mortgage upon said property; nor has this Court any jurisdiction to now decree a foreclosure of the mortgage set forth in said complaint and a sale thereunder; nor to enter a decree enjoining this defendant from selling or conveying or transferring or encumbering or hypothecating or bonding or otherwise disposing of said property; or grant the relief or any thereof prayed for in said complaint.

3. That it appears from the face of the complaint herein that the plaintiff, having selected his forum, seeks to vacate, annul or avoid a judgment of said District Court and also a decision of the Supreme Court of the State of Idaho, affirming the judgment of said District Court for alleged errors and matters appearing in said action and proceedings, all of which the plaintiff herein had knowledge, and this Court has no jurisdiction or power

to review, vacate, annul or avoid the said judgment or proceedings of said District Court or said decision of said Supreme Court for any reasons alleged in said complaint, said courts having jurisdiction both of the subject matter and the persons in said action, the same being an action to foreclose a mortgage and establish priorities of certain liens on lands situate in said Elmore County, State of Idaho.

4. That this defendant is successor in interest of the purchaser at said Receiver's sale as shown by said complaint, which said sale was made under the orders of a court having the jurisdiction in said foreclosure suit of both the parties and the subject matter and that the same have never been reversed or set aside and are therefore final and conclusive against the plaintiff herein who was the plaintiff in said foreclosure action in said State Court.

5. That the judgments sought to be annulled and avoided were rendered by Courts of competent jurisdiction, on the merits, and remain unreversed and are therefore final and conclusive and *res judicata* and a bar to the action herein.

6. That a Federal Court will not set aside a judgment of a State Court where the proceedings, as in the action herein, is merely tantamount to a common law practice of moving to set aside a judgment for irregularity, or to a writ of error or to a bill of review or an appeal.

7. That this Court has no jurisdiction of the matters alleged in said complaint for the reason that it is shown by said complaint that the plaintiff had

a plain, speedy and adequate remedy at law for the errors and matters complained of by motion for new trial in said District Court and by proper appeal to the Supreme Court of the State of Idaho.

8. That this Court has no jurisdiction of the subject matter of said action for the reason that the plaintiff had a proper and sufficient remedy for the errors or matters complained of by appeal to the Supreme Court of the United States of America.

9. That a Federal Court cannot revise or set aside final decrees rendered by State Courts which had complete jurisdiction of the parties and subject matters upon the ground that the decree was obtained by such fraud as alleged in the complaint herein, or where the injured party had an opportunity to apply to an appellate court to reverse the decree.

10. That this Court has no jurisdiction to set aside a judgment or proceedings of a State Court for alleged excess of jurisdiction even if appearing on the face of the record in an action wherein the State Court had acquired jurisdiction of the parties and of the subject matter.

11. That said plaintiff is entitled to no relief herein and if he was at any time entitled to relief he has lost his right thereto and the same is barred by reason of his laches.

12. That the cause of action herein is barred by the provisions of Section 4054, Sub. 4, and by Section 4052 of the Revised Codes of the State of Idaho.

13. For want of equity, in that the said plaintiff has not by his said complaint, made such a case as entitles him, in a Court of equity, to relief, or any thereof, from or against this defendant touching the matters in said complaint, or any such matters.

14. That the facts stated in said complaint are insufficient to constitute a valid cause of action against this defendant or to entitle the complainant to any relief in a court of equity.

Dated: May, 21, 1914.

W. C. HOWIE,

Residence: Mountain Home, Idaho.

L. L. SULLIVAN,

Residence: Boise, Idaho.

W. E. SULLIVAN,

Residence: Boise, Idaho.

Solicitors for Defendant, Mountain Home Co-Operative Irrigation Company.

Service of a Copy of the foregoing Motion admitted this 21st day of May, 1914, by me as directed on said Complaint; said direction being as follows: "Please serve copies of adverse pleadings herein on Clerk of Court who will mail same to me." (Signed) "Leon W. Behrman."

A. L. RICHARDSON,

Clerk of above entitled Court,

By E. B. Yarrington, Deputy.

Endorsed: Filed May 21, 1914. A. L. Richardson, Clerk. By E. B. Yarrington, Deputy.

JUDGMENT OF DISMISSAL.

*In the District Court of the United States for the
District of Idaho, Southern Division.*

HENRY HEWITT, Jr.,

Plaintiff,

vs.

MOUNTAIN HOME CO-OPERATIVE IRRIGATION
COMPANY, a Corporation, and GREAT
WESTERN BEET SUGAR Co., a Corporation,
Defendants.

IN EQUITY, No. 484.

Judgment of Dismissal.

The motion of defendant, Mountain Home Co-Operative Irrigation Company, a corporation, to dismiss the Bill of Complaint herein coming on regularly to be heard on the second day of July, 1914, Leon W. Behrman, Esq., appearing as counsel for plaintiff and W. E. Sullivan, Esq., appearing as counsel for said defendant, and the matter being fully argued to the Court by respective counsel, and the Court being fully advised in the premises and it appearing to the Court that the judgments and proceedings on the sale thereunder of the District Court of the Fourth Judicial District of the State of Idaho in and for the County of Elmore, and of the Supreme Court of the State of Idaho, sought to be annulled and avoided in the Bill of Complaint herein, were had and rendered by Courts of competent jurisdiction, on the merits, and remained unreversed and

are therefore final and conclusive and *res judicata* and a bar to the action herein; and it further appearing to the Court that if said judgments of said State Courts were annulled and avoided as prayed for in the Bill of Complaint herein, such holding would be ineffective and useless for the reason that no further relief of foreclosing the mortgage of the plaintiff as prayed for herein could be granted as an action of foreclosure thereon is barred by the provisions of Section 4052 of the Revised Codes of the State of Idaho, which provides that an action upon any contract, obligation or liability founded upon an instrument in writing must be commenced within five years; and it further appearing to the Court that said Bill of Complaint should be dismissed for want of equity in that the said plaintiff has not by his said Bill of Complaint, or any part thereof, made such a case as entitles him, in a court of Equity, to any relief, or any thereof, from or against said defendant touching the matters in said complaint, or any such matters, and that the facts stated in said complaint, and all grounds for relief therein set forth, are insufficient to constitute a valid cause of action against said defendant or to entitle the complainant to any relief in a court of equity; and that the motion of said defendant should be sustained;

It is Therefore Ordered, Adjudged and Decreed: That the Motion of said defendant, Mountain Home Co-Operative Irrigation Company to dismiss the

Bill of Complaint herein be, and the same hereby is, sustained and said Bill of Complaint is dismissed.

Dated July 3rd, 1914.

FRANK S. DIETRICH,
United States District Judge.

Endorsed: Filed July 3, 1914. A. L. Richardson, Clerk.

ASSIGNMENT OF ERRORS.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

HENRY HEWITT, Jr.,

Plaintiff,

vs.

MOUNTAIN HOME CO-OPERATIVE IRRIGATION COMPANY, a Corporation, and GREAT WESTERN BEET SUGAR COMPANY, a Corporation,

Defendants.

Assignment of Errors.

Comes Now the plaintiff and files the following assignment of errors upon which he will rely upon his appeal from the order and decree made by this Honorable Court on the 3rd day of July, 1914, in the above entitled cause:

The Court Erred, to-wit:

I.

In allowing and sustaining the motion of the defendant, Mountain Home Co-Operative Irrigation Company to dismiss the Bill of Complaint herein.

II.

In ordering, adjudging and decreeing that the Bill of Complaint herein be dismissed.

LEON W. BEHRMAN,
Attorney for Plaintiff.

Due service of the within Assignment of Errors is hereby accepted in Ada County, Idaho, this 21st day of December, 1914, by receiving a copy thereof, duly certified to as such by Leon W. Behrman, Attorney for Plaintiff.

SULLIVAN & SULLIVAN,
Attorneys for Defendant.

Endorsed: Filed Dec. 21, 1914. A. L. Richardson, Clerk.

PETITION FOR APPEAL.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

HENRY HEWITT, Jr.,

Plaintiff,

vs.

MOUNTAIN HOME CO-OPERATIVE IRRIGATION COMPANY, a Corporation, and GREAT WESTERN BEET SUGAR COMPANY, a Corporation,

Defendants.

Petition for Appeal.

The above named plaintiff conceiving himself aggrieved by the order and judgment entered in the

above entitled cause on the 3rd day of July, 1914, wherein it was ordered and decreed that the Bill of Complaint herein be dismissed, does hereby appeal from the said order and decree of 3rd July, 1914, to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of errors filed herein, and he prays that this appeal may be allowed, and that a transcript of the record upon which said order and decree were made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

LEON W. BEHRMAN,
Attorney for Plaintiff.

Endorsed: Filed December 21, 1914.

A. L. Richardson, Clerk.

ORDER ALLOWING APPEAL.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

HENRY HEWITT, Jr.,

Plaintiff,

vs.

MOUNTAIN HOME CO-OPERATIVE IRRIGATION COMPANY, a Corporation, and GREAT WESTERN BEET SUGAR COMPANY, a Corporation,

Defendants.

Order Allowing Appeal.

On motion of Mr. Leon W. Behrman, of counsel for plaintiff, herein, it is ordered that an appeal to

the United States Circuit Court of Appeals for the Ninth Circuit from the decree heretofore filed herein be and the same is hereby allowed.

It is further ordered that the bond on appeal be fixed in the sum of \$500.00.

FRANK S. DIETRICH,
United States District Judge for the District of
Idaho.

Endorsed: Filed Dec. 21, 1914.

A. L. Richardson, Clerk.

BOND ON APPEAL.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

HENRY HEWITT, Jr.,

Plaintiff,

vs.

MOUNTAIN HOME CO-OPERATIVE IRRIGATION COMPANY, a Corporation, and GREAT WESTERN BEET SUGAR COMPANY, a Corporation,

Defendants.

Bond on Appeal.

Know All Men by These Presents: That Henry Hewitt, Jr., as principal and *National Surety Company*, as surety are held and firmly bound to the aforesaid defendants, their successors and assigns in the sum of Five Hundred Dollars (\$500.00), United States gold coin, to be paid to the aforesaid,

their successors and assigns, to which payment, well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Dated this 9th day of January, A. D. 1915.

Whereas the above named Henry Hewitt, Jr. has appealed to the Circuit Court of Appeals of the United States, for the Ninth Circuit to reverse the decree in the above entitled suit by the District Court of the United States for the District of Idaho, Southern Division.

Now Therefore, the conditions of this obligation are such that if the above named Henry Hewitt, Jr. shall prosecute his appeal to effect, and answer all damages and costs, if he fail to make his appeal good then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

HENRY HEWITT, Jr.,

By Leon W. Behrman, his attorney of record.

NATIONAL SURETY COMPANY,

By Marc Hubbert, Resident Vice President.

Attest: M. S. Mann, Resident Asst. Secy.

This bond approved as to form, amount and sufficiency of surety.

WM. B. GILBERT,

United States Circuit Judge.

Endorsed: Filed January 18, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy Clerk.

PRAECIPE FOR TRANSCRIPT.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

HENRY HEWITT, Jr.,

Plaintiff,

vs.

MOUNTAIN HOME CO-OPERATIVE IRRIGATION COMPANY, a Corporation, and GREAT WESTERN BEET SUGAR COMPANY, a Corporation,

Defendants.

Praecipe for Transcript.

To the Clerk of the Above Entitled Court:

You will please furnish transcript on appeal to the United States Circuit Court of Appeals, Ninth Circuit, in the within cause, said transcript to consist of the following:

1. Bill of Complaint.
2. Motion to Dismiss.
3. Decree of Court.
4. Petition for Appeal.
5. Order allowing Appeal.
6. Citation on Appeal.
7. Bond on Appeal.
8. Assignment of Errors.
9. Stipulation allowing additional time to perfect Appeal.
10. Order allowing additional time to perfect Appeal.

LEON W. BEHRMAN,
Attorney for Plaintiff.

Endorsed: Filed January 18, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy Clerk.

STIPULATION.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

HENRY HEWITT, Jr.,

Plaintiff,

vs.

MOUNTAIN HOME CO-OPERATIVE IRRIGATION COMPANY, a Corporation, and GREAT WESTERN BEET SUGAR COMPANY, a Corporation,

Defendants.

Stipulation.

It is Hereby Stipulated between plaintiff and defendants by their respective attorneys that plaintiff have to and including March 15th, 1915, to perfect his appeal in the within cause to the United States Circuit Court of Appeals, Ninth Circuit, by filing the necessary transcript therefore not waiving any right of the defendant to object to any defect in taking said appeal.

SULLIVAN & SULLIVAN,

Attorneys for Defendant.

LEON W. BEHRMAN,

Attorney for Plaintiff.

Boise, Idaho, Jan. 15, 1915.

Endorsed: Filed January 18, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy Clerk.

ORDER.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

HENRY HEWITT, Jr.,

Plaintiff,

vs.

MOUNTAIN HOME CO-OPERATIVE IRRIGATION COMPANY, a Corporation, and GREAT WESTERN BEET SUGAR COMPANY, a Corporation,

Defendants.

Order.

Based on a stipulation by respective counsel herein, heretofore filed.

It is Hereby Ordered that plaintiff have to and including March 15th, 1915, to perfect his appeal in the within cause to the United States Circuit Court of Appeals, Ninth Circuit, by filing the necessary transcript therefor.

WM. S. GILBERT,

United States Circuit Judge.

Dated January 15, 1915.

Endorsed: Filed January 18, 1915. A. L. Richardson, Clerk. By Pearl E. Zanger, Deputy Clerk.

CITATION ON APPEAL.

United States of America,
District of Idaho,—ss.

To Mountain Home Co-Operative Irrigation Com-

pany, a corporation, and to Sullivan and Sullivan, its attorneys of record, Greeting:

Whereas, Henry Hewitt, Jr. has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Idaho, in your favor, and has given the security required by law;

You are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, Oregon, in said District, this 15th day of January, in the year of our Lord, one thousand, nine hundred and fifteen.

WM. B. GILBERT,

Circuit Judge.

Service accepted at Boise, Idaho, January 18th, 1915. Sullivan & Sullivan, Attorneys for Defendant.

Endorsed: Filed January 18, 1915. A. L. Richardson, Clerk.

In the District Court of the United States, for the District of Idaho, Southern Division.

HENRY HEWITT, Jr.,

Plaintiff,

vs.

MOUNTAIN HOME CO-OPERATIVE IRRIGATION COMPANY, a Corporation, and GREAT WESTERN BEET SUGAR COMPANY, a Corporation,

Defendants.

Stipulation.

It is Hereby Stipulated between plaintiff and defendant, Mountain Home Co-Operative Irrigation Company, by their respective counsel that plaintiff have to the first day of May, 1915, to file transcript on appeal in the United States Circuit Court of Appeals, Ninth Circuit, and have until that day to perfect his appeal not waiving any right of said defendants to object to any defects in taking said appeal.

Dated Boise, Idaho, April 9, 1915.

SULLIVAN & SULLIVAN,

Attorneys for Defendants.

LEON W. BEHRMAN,

Attorney for Plaintiff.

Endorsed: Filed Feb. 12, 1915. A. L. Richardson, Clerk.

In the District Court of the United States, for the District of Idaho, Southern Division.

HENRY HEWITT, Jr.,

Plaintiff,

vs.

MOUNTAIN HOME CO-OPERATIVE IRRIGATION COMPANY, a Corporation, and GREAT WESTERN BEET SUGAR COMPANY, a Corporation,

Defendants.

Order.

Based on a stipulation between respective counsel herein heretofore filed,

It is hereby ordered that plaintiff have until the first day of May, 1915, to perfect his appeal herein to the Circuit Court of Appeals of the United States, Ninth Circuit, by filing therein the necessary records, and that he have until that day to file his transcript in said court.

Dated Feb. 12, 1915.

FRANK S. DIETRICH,
Judge.

Endorsed: Filed Feb. 12, 1915. A. L. Richardson, Clerk.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

HENRY HEWITT, Jr.,

Plaintiff,

vs.

MOUNTAIN HOME CO-OPERATIVE IRRIGATION COMPANY, a Corporation, and GREAT WESTERN BEET SUGAR COMPANY, a Corporation,

Defendants.

Stipulation.

It is hereby stipulated between plaintiff and defendants herein by their respective counsel, Mr. Leon W. Behrman for plaintiff and Mr. W. E. Sullivan

for defendants that plaintiff may have to and including June first, 1915, to perfect his appeal from this court to the United States Circuit Court of Appeals, Ninth Circuit, by filing the necessary records therefor, not waiving any right in said defendant to object to any defect in taking said appeal.

W. E. SULLIVAN,
Attorney for Defendants.
LEON W. BEHRMAN,
Attorney for Plaintiff.

Dated Boise, Idaho, April 9, 1915.

Endorsed: Filed April 9, 1915. A. L. Richardson, Clerk.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

HENRY HEWITT, Jr.,

Plaintiff,

vs.

MOUNTAIN HOME CO-OPERATIVE IRRIGATION COMPANY, a Corporation, and GREAT WESTERN BEET SUGAR COMPANY, a Corporation,

Defendants.

Order.

Based on a stipulation heretofore entered into between the parties herein by and between their respective counsel, and filed in this court, it is hereby,

Ordered that plaintiff have to and including the first day of June, 1915, to perfect his appeal from

this Court to the United States Circuit Court of Appeals, Ninth Circuit, by filing the necessary records therefor.

Dated April 9, 1915, Boise, Idaho.

FRANK S. DIETRICH,

Judge.

Endorsed: Filed April 9, 1915. A. L. Richardson, Clerk.

RETURN TO RECORD.

And thereupon it is ordered by the Court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

Attest:

A. L. RICHARDSON,

(Seal)

Clerk.

CLERK'S CERTIFICATE.

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

HENRY HEWITT, Jr.,

Plaintiff,

vs.

MOUNTAIN HOME CO-OPERATIVE IRRIGATION COMPANY, a Corporation, and GREAT WESTERN BEET SUGAR COMPANY, a Corporation,

Defendants.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 61, to be full, true and correct copies of the pleadings and proceedings, in accordance with the praecipe on file herein, in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$102.85, and that the same has been paid by the appellant.

Witness my hand and the seal of said Court, affixed at Boise, Idaho, this 22d day of May, 1915.

A. L. RICHARDSON,

(Seal)

Clerk.

IN THE
**UNITED STATES CIRCUIT COURT
 OF APPEALS**

FOR THE NINTH CIRCUIT

HENRY HEWITT, JR.,

Appellant,

vs.

GREAT WESTERN BEET
 SUGAR COMPANY, a Corpora-
 tion, and

MOUNTAIN HOME CO-OP-
 ERATIVE IRRIGATION
 COMPANY, a Corporation,

Appellees.

Appeal from the United States District Court for the
 District of Idaho, Southern Division.

APPELLANT'S BRIEF

LEON W. BEHRMAN, and
 FRANK C. HESSE,

Portland, Oregon,

Attorneys for Appellant,

IN THE
**UNITED STATES CIRCUIT COURT
OF APPEALS**

FOR THE NINTH CIRCUIT

HENRY HEWITT, JR.,

Appellant,

vs.

GREAT WESTERN BEET
SUGAR COMPANY, a Corpora-
tion, and

MOUNTAIN HOME CO-OP-
ERATIVE IRRIGATION
COMPANY, a Corporation,

Appellees.

Appeal from the United States District Court for the
District of Idaho, Southern Division.

APPELLANT'S BRIEF

STATEMENT OF FACTS.

' On January 30th, 1907, the Great Western Beet Sugar Company mortgaged to the appellant a certain irrigation system, as security for the payment of \$80,000.00.

Prior to August 4th, 1908, Idaho Fruit Lands Company brought an action against Great Western Beet Sugar Company to determine its interest in the same property heretofore mortgaged to appellant, which said action was filed after the plaintiff in error had recorded his above mortgage. A receiver was appointed in this action and at the trial it was held that said Fruitlands Company had no interest in said property, which decision was affirmed by the Idaho Supreme Court. Appellant was not made a party to this action, neither did he have knowledge of the pendency thereof, he being a resident of the State of Washington. In this cause the receiver issued receivers' certificates amounting to \$17,625.00.

On August 4th, 1908, appellant filed in the Idaho District Court a suit to foreclose his mortgage, which court rendered a judgment in his favor, and ordered the mortgage foreclosed. However, in said decree the Court on its own motion declared the receivers' certificates issued in the Idaho Fruitlands Company case, to which appellant was not a party, to be a prior lien to his mortgage. He, objecting to this part of the decree, appealed to the Supreme Court of the State of Idaho, said Court affirming the decree. An attempt of his to prevent a sale of the property by a writ of prohibition was also defeated by the Idaho Supreme Court, and the property was sold by the receiver Harry Watkins, by him transferred to James H. Brady, and by Brady transferred to defendant Mountain Home Co-operative Irrigation Company. This property was worth upwards of half a million dollars,

and yet was sold for only one-tenth of its value, the reason for such low price being, that said sale was manipulated by the fraudulent acts of the receiver and others, including the purchaser at said sale, and by connivance and conspiracy competition at said sale was prevented, and prospective buyers were induced to remain absent.

Mr. Hewitt again objected in the District Court to the confirmation of the sale on grounds other than fraud and collusion practiced thereat, the said court overruling the objections and confirming said sale, which said order of confirmation was likewise affirmed on appeal by the Idaho Supreme Court.

Throughout the entire proceedings, Mr. Hewitt contended at all times that that part of the decree declaring said receiver's certificates to be prior liens to his mortgage, and all the acts thereunder, was a taking of his property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

On the 30th day of April, 1914, plaintiff in error filed this suit in the United States District Court for the District of Idaho, Southern Division, to set aside said decree and sale thereunder, and praying as incidental relief for a decree foreclosing his mortgage and a resale of said property. To this complaint defendant in error Mountain Home Co-operative Irrigation Company filed a motion to dismiss, which motion was sustained by the Court, mainly on the ground that the statute of limitations had run against Mr. Hewitt and

that relief against the decree would be useless. Plaintiff in error now brings this appeal to reverse the District Court's decree in sustaining said motion to dismiss complaint.

ASSIGNMENT OF ERRORS.

Comes now the plaintiff and files the following assignment of errors upon which he will rely upon his appeal from the order and decree made by this Honorable Court on the 3rd day of July, 1914, in the above entitled cause.

The Court erred, to-wit:

I.

In allowing and sustaining the motion of the defendant Mountain Home Co-operative Irrigation Company, a corporation, to dismiss Bill of Complaint herein.

II.

In ordering, adjudging and decreeing that the Bill of Complaint herein be dismissed.

LEON W. BEHRMAN,

Attorney for Plaintiff.

POINTS AND AUTHORITIES.

Under the code system of pleading where a former judgment is relied on as an estoppel in another suit, it must be pleaded.

1 Encl. Pl. and Pr. 843.

9 Encl. Pl. and Pr. 611 et. subs.

Only when the estoppel plainly appears from the face of the complaint may the defense be taken advantage of by demurrer.

9 Enc. Pl. and Pr. 613.

50 Ind. 410.

25 S. E. 698.

In Equity, the defense of former adjudication, to bar a hearing on the merits, must always be set up by proper averments in the pleadings, and a defendant *cannot* present the question by a *motion to dismiss the bill*.

9 Encl. Pl. and Pr. 616.

58 Miss. 806.

Only where the bill itself sets forth the former adjudication, may the objection be taken by demurrer.

9 Enc. Pl. and Pr. 617.

“No conclusive effect can be given to a judgment which is absolutely *void*, whether its invalidity results from a want of jurisdiction over the parties, or over

the subject-matter of the controversy, or from a want of authority in the Court to go beyond the pleadings and evidence and render a judgment not in issue or not submitted to it."

23 Cyc. 1235.

Laches should always be pleaded specially unless the laches appear on the face of the bill.

6 Enc. Pl. and Pr. 404 and cases there cited.

12 Enc. Pl. and Pr. 832 and cases there cited.

"When a former judgment is set up as a bar or estoppel, the question whether there is such an identity of the parties and of the subject-matter and cause of action as will support a plea of *res adjudicata* is a question of law for the Court *when* it is determinable from an inspection of the record alone, but if extrinsic evidence is required to effect the necessary identification, it becomes a question of fact and must go to the jury."

23 Cyc. 1543.

A judgment rendered against one who was not made a party to the action, or not duly cited, is void.

23 Cyc. 683 and notes.

30 Cent. Digest Judgments, Section 24.

The judgment obtained by the Idaho Fruit Lands Company is not pleadable in bar nor admissible in evi-

dence against us, for we were strangers to the litigation in which said judgment was rendered.

23 Cyc. 1280, 12.

“ It is a rule of universal application that the rights of no one shall be concluded by a judgment rendered in a suit to which he is not a party, and that a party cannot be bound by a judgment without being allowed a day in Court.”

37 Cal. 346.

36 La. Ann. 796.

24 Miss. 393.

1 Dev. L. (N. Car.) 187.

82 Tex. 319.

A person must be cited or have made himself a party to the suit in order to authorize a judgment against him.

XI Enc. Pl. and Pr. 842.

Persons having liens upon or claims to property which is the subject-matter of an action, or rights of action against one or more of the parties thereto, are not bound by the judgment if they were not made parties to the suit, although their claims were brought into issue in such actions, or although their rights depend upon the same transaction or facts which were litigated and decided in that action.

23 Cyc. 1237b.

30 Cen. D. Judgments, S. 1179.

Mortgagees or creditors not before a state court cannot be affected by a decree of said state court, adjudging the rank or priority of receiver's certificates.

Metropolitan Trust Co. v. Lake Cities Electric Co., 100 Fed. 897.

Union Trust Co. vs. Ill. Midland R. R. Co., 117 U. S. 434.

Every litigant has the right to pursue his own theory of his case. The theory made out by his complaint governs, upon it he must win or fail, and no Court has the right to change that theory for or against him.

See Article Theory of Case, 21 Enc. Pl. and Pr. 649.

A court cannot render a valid judgment in favor of a party who is not before the Court and is not represented in any manner in the action.

XI Enc. Pl. and Pr. 843.

54 Hun. (N. Y.) 80.

39 Cal. 688.

63 Tex. 38.

29 S. W. 873.

7 Ill. 412.

24 Miss. 393.

12 N. C. 187.

A decree must be valid or void as to a whole, and if it is a nullity as to some of the parties affected, it is likewise a nullity as to all.

6 Mackey (D. C.) 548.

62 Ill. App. 180.

62 Ill. App. 149.

85 Miss. 662.

65 Fed. 705.

140 Ind. 95.

7 Ill. 412.

Judgments must be responsive to the issues presented in the pleadings, and as has been seen, must respond to and determine all the issues.

“Issues not raised by the pleadings will not be determined.”

XI Enc. Pl. and Pr. 878.

94 Ga. 617.

41 Calif. 278.

98 Cal. 199.

A judgment based upon issues not made by the pleadings are *corum non judice* and *void*, and *subject to be set aside or disregarded even in a collateral proceeding*.

Reynolds vs. Stockton, 140 U. S. 254.

34 N. J. L. 418.

43 N. J. E. 211.

Corwithe vs. Griffing, 21 Barb. 9.

28 Utah 337 (79 Pac. 180).

11 Enc. Pr. and Pl. 879.

23 Cyc. 816.

23 Col. 217.

108 Ind. 512.

27 Ind. App. 544 (61 N. E. 750).

These cases proceed upon the theory that a Court has no jurisdiction to pass upon questions not submitted to it by the parties for decision.

“ A void judgment cannot be made valid and operative by its subsequent approval by the judge, by his approval of a sale on execution held under it (28 Ore. 485), by afterwards supplying the elements which were lacking to its validity, by a subsequent proceeding instituted for that purpose in a court of equity, by citing a party against whom it was entered to show cause why it should not be declared valid, by a revival of the judgment, or *by the taking of an appeal from it, or even by an affirmance on appeal.*

23 Cyc. 698.

59 Missouri App. 254.

23 Tex. 10.

17 Utah 412.

A judgment, though void, is so far considered in existence in order to support an appeal.

2 Cyc. 590h, and cases cited.

“ In order that a judicial sale may be validly made it is necessary that the Court by which it was ordered shall have the general power to decree a sale, and that in a particular case the jurisdiction of the Court over the subject-matter shall have been acquired in a proper manner.”

24 Cyc. 6.

Vol. XVII Am. and Eng. Enc. of Law 956.

“ The order of confirmation gives to the sale the judicial sanction of the Court, and then it relates back to the time of the sale and cures all defects and irregularities, *except those founded on want of jurisdiction or fraud; and confirmation does not validate a sale that is void from want of jurisdiction or otherwise.*”

13 Cyc. 36.

XVII Am. and Eng. Enc. of Law 993.

103 Fed. 391.

2 How. (U. S.) 43.

33 Cal. 45.

10 Kans. App. 299.

EQUITY ALWAYS HAS HAD AND STILL HAS THE POWER TO ENJOIN THE ENFORCEMENT OF A JUDGMENT WHICH IS ABSOLUTELY AND ENTIRELY VOID.

108 Ala. 314.

13 Cal. 558.

12 Col. App. 233.

51 Ga. 467.
 47 Ga. 476.
 34 Ind. 348.
 46 Ind. 59.
 118 Iowa 51.
 106 Iowa 131.
 101 Iowa 482.
 23 La. Ann. 483.
 9 Nev. 704.
 66 Tex. 548.
 23 Tex. 104.

And especially, if the judgment is regular on its face and does not disclose the grounds of its invalidity.

16 Kans. 270.
 63 Mo. App. 414.

A court of equity may, upon sufficient cause being shown, *grant relief against a judgment, decree or order of any judicial tribunal.*

1 Idaho 113.
 77 N. C. 238.
 49 Pa. St. 365.
 1 Tenn. Ch. 174.

“ The federal courts are prohibited by statute from granting injunctions to stay proceedings in the State Courts, and this prevents them from enjoining the enforcement of judgments recovered in State Courts.

BUT a FEDERAL COURT HAVING OTHERWISE JURISDICTION OF THE ACTION MAY MAKE A DECREE WHICH AS BETWEEN THE PARTIES, SHALL SET ASIDE AND VACATE A JUDGMENT OF A STATE COURT, AND THE PROCEEDINGS TAKEN AND RIGHTS ACQUIRED THEREUNDER, ON THE GROUND THAT IT WAS PROCURED BY FRAUD OR WAS *VOID FOR WANT OF JURISDICTION.*"

23 Cyc. 987.

Cooper vs. Newall, 173 U. S. 555.

Howard vs. De Cordova, 177 U. S. 609.

North Pac. Ry. Co. vs. Kurtzman, 82 Fed. 241.

Davenport vs. Moore, 74 Fed. 945.

161 U. S. 334, 342, 345.

When a judgment recovered in a State Court is offered as a cause of action or defense in a Federal Court, the latter Court may inquire into the jurisdiction of the former; and the effect of the judgment will be avoided if it is shown that the court rendering it lacked jurisdiction of the subject-matter or of the parties.

23 Cyc. 1597.

30 Cen. Dig. Judg., Sec. 1505, and authorities there cited.

It is a rule of universal application that where fraud has been practiced at a judicial sale it will be set aside, even after confirmation.

24 Cyc. 40.

82 Ala. 500.

19 Neb. 33.

41 N. J. Eq. 656.

22 Barb. 167.

68 S. C. 250.

7 Watts (Pa.) 552.

Although inadequacy of price is generally not sufficient ground for setting aside a sale, yet if it raises a presumption of fraud or shock the conscience of the Court or if there are other circumstances connected therewith, showing apparent unfairness, the Court may vacate the sale.

24 Cyc. 39, and authorities cited.

AND A FEDERAL COURT HAS POWER TO SET ASIDE A SALE ORDERED BY A STATE COURT.

Arrowsmith vs. Gleason, 129 U. S. 86.

De Forest vs. Thompson, 40 Fed. 375.

“The due process of law required by the Constitution means that notice or summons by which a party is tendered his day in Court with the right to frame an

issue and be heard before judgment can be rendered or execution issued which shall take away his liberty or property.”

104 Mich. 254.

Section 4213, Idaho Statutes. In pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of Section —— (giving the number of the section and subdivisions thereof, if it is so divided, relied upon) of the Code of Civil Procedure; and if such allegation be controverted, the party pleading must establish on the trial the facts showing that the cause of action is so barred.

Section 4050. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

Section 4051. Within 6 years:

1. An action upon a judgment or decree of any Court of the United States, or of any State or Territory within the United States.

Section 4052. Within 5 years:

An action upon any contract, obligation, or liability founded upon an instrument in writing.

Section 4054. Within 3 years:

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be

deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

Section 4068. An action is commenced within the meaning of the title, when the complaint is filed.

Section 4074. When the commencement of an action is stayed by injunction of statutory prohibition, the time of the continuance of the injunction or prohibition is not a part of the time limited for the commencement of the action.

When one may sue for installments of a debt as they come due, or wait until all is due, the statute runs from the time when all is due, if the creditor elects to wait.

43 Ark. 275.

65 Ark. 312 (45 S. W. 988).

29 Tex. Civ. App. 253 (69 S. W. 487).

Nevertheless, the rule that a Court cannot create exceptions to the Statute of Limitations, a limited class of exceptions not provided by the statutes, but arising out of necessity, have been generally recognized and enforced.

A. & E. Enc. of Law, 2nd Ed., Vol. 19, p. 212.

Brown vs. Souerwine, 10 Wall. U. S. 223.

Amy vs. Watertown, 130 U. S. 320.

Hopkirk vs. Bell, 3 Cranch U. S. 454.

The statute of limitations, though one of repose, was not intended to bar a plaintiff's remedy where it was impossible for him to begin his action during the pendency of a certain state of affairs.

U. S. vs. Wiley, 11 Wall. U. S. 513.

Wherever the plaintiff is prohibited from exercising his legal remedy by some paramount power, as by process of the Courts or by direct or indirect legislation, or by a mere condition of affairs which precludes his bringing his suit, the time during which he is thus prevented is not to be counted against him in determining whether the statute of limitations has barred his action, even though the statute makes no specific exemption in his favor in those cases.

Brown vs. Souerwine, 10 Wall. U. S. 218.

87 Minn. 117.

141 Pac. 589.

A. & E. Enc. of Law, Second Edition, Vol. 19.,
page 212.

The same rule applies where the plaintiff is prevented from beginning suit by the pendency of any other legal proceedings which operates as an injunction, e.g., the appointment of a receiver to wind up an insolvent corporation, or a filing of general creditor's bill for the same purpose, or *by an appeal*.

(Hays vs. Tilson, 45 S. W. 479.

132 Ind. 487 (32 N. E. 324).

143 Ind. 671 (42 N. E. 921).

Brand vs. Garneau et al., 93 N. W. 219.

91 N. E. 871.

150 N. Y. Supp. 683.)

—or similar proceeding which operates *ex proprio vigore* to prevent the institution of an action or suit.

A. & E. Enc. of Law, 2nd Ed., Vol. 19, page 219.

ARGUMENT.

The fourteen reasons assigned in defendant's motion to dismiss plaintiff's complaint can be conveniently segregated under the heads of Estoppel and former adjudication, which covers points 4 and 5 of defendant's motion to dismiss; Laches, which covers point 11 of defendant's motion to dismiss; Failure on the part of plaintiff to appeal from the various decisions of the State Court, which covers points 6, 7 and 8 of defendant's motion to dismiss; Want of jurisdiction of the Federal Court and failure of plaintiff to state facts sufficient in his complaint to constitute a cause of suit, which covers points 1, 2, 3, 9, 10, 13 and 14 of defendant's motion to dismiss; and the plea of the Statute of Limitations, which involves point 12 of defendant's said motion to dismiss. For the purpose of arguing this appeal, we shall therefore follow the preceding arrangement.

POINTS IV AND V.

The rule of pleading with reference to the law of Estoppel and Former Adjudication is unanimously to the effect, that *where a former judgment is relied on as an estoppel in another suit under the code system of pleading, that such judgment must be pleaded* (1 Encl. of Pl. and Pr. 843, 9 Enc. Pl. and Pr. 611, et subs). *It is only when the estoppel plainly appears from the face of the complaint, that the defense may be taken advantage of by demurrer.* (9 Enc. Pl. and Pr. 613.) *The rule in equity is the same, namely, that the defense*

of former adjudication, to bar a hearing on the merits, must be put in issue by proper averments in the pleadings, and that this question cannot be presented by a motion to dismiss the bill (9 Enc. Pl. and Pr. 616), only where the bill itself sets forth the former adjudication may the objection be raised by demurrer or motion to dismiss. (9 Enc. Pl. and Pr. 617.)

The reasons of this rule are obvious, for unless the pleadings, findings and decree of the former suit are given either in *hac verbae*, or in full substance, the Court will not be in a position to tell by an examination of the new bill, whether the former and the present suit are between the same parties or their privies, are for the same cause of action whether the former adjudication was on the merits, and whether the issues raised in the new suit were either actually determined, or could have been determined in the former suit.

The complaint does not recite either the exact language nor the substance or these various decisions, judgments, orders and decrees rendered by the State Circuit and Supreme Court of Idaho, and if defendant claims that these, or some of these, decisions, judgments, orders and decrees are a complete bar to plaintiff's right to maintain this present suit, it can do so only by pleading and proving the nature and extent of these proceedings, and the identity of parties, subject-matters and causes of action involved. This rule of pleading seems to us so well established that we shall forbear to cite authorities at length, beyond the bare reference to the above-mentioned well known work on pleading.

POINT XI.

Laches, likewise, should always be pleaded specially, unless they appear plainly on the face of the bill. (6 Enc. Pl. and Pr. 404; 12 Enc. Pl. and Pr. 832). The bill is virtually alive with allegations, and the court records of the State of Idaho bear ample testimony, as to the strenuous and flourishing litigation that this plaintiff maintained, and was subjected to, to assert his rights and attempt to prevent the Idaho State Courts from confiscating his property without due process of law. To hold that this plaintiff was guilty of laches is almost humorous, and this Court should frown upon any assertions of that sort on the part of a defendant, who not only failed to pay this plaintiff a single, solitary cent of his \$80,000.00 and interest, but has kept him fighting in the Courts ever since his mortgage came due, with the result of being *plus the experience and minus the money*.

POINTS VI, VII AND VIII.

We are not attempting to dispute the rule of law, that a litigant who fails to appeal from a valid decision is and ought be bound by the decree of the trial Court for there must be an end to litigation somewhere and some time.

However, this rule applies only to a judgment or decree which is either erroneous, voidable, or irregular, but *not* to one which is *void for want of jurisdiction* over

the *person* or *subject-matter* of the suit. A *void* judgment binds *no one*, or, as better expressed in the language of 23 Cyc. 1124:

“No conclusive effect can be given to a judgment which is absolutely *void*, whether its invalidity results from a want of jurisdiction over the parties, or over the subject-matter of the controversy, or from a want of authority in the Court to go beyond the pleadings and evidence and render a judgment not in issue or not submitted to it.

23 Cyc. 1235.

Neither can validity be breathed into a void decree by permitting the statutory time for an appeal, writ of error or certiorari to expire. The law never contemplated that a man against whom a void judgment was rendered, should appeal it from the justice Court to the Supreme Court of the United States through all the various intermediate Courts, and put up the incidental expense, and suffer the worry and loss of time incident to the litigation, when a Court of Equity in the first instance could give him an adequate and speedy remedy by a writ of injunction.

POINTS I, II, III, XI, X, XIII AND XIV.

All of the above points involve more or less the proposition whether or not this Court has jurisdiction of the subject-matter of this suit, or what amounts to the same thing, whether or not the complaint states facts sufficient to constitute a cause of suit.

We have heretofore considered the point that a *void* judgment binds nobody, is of no effect, is nothing but a nullity, and does not operate as an estoppel between the parties. (Points 6, 7 and 8.) If we are correct in this statement, then there remain but two questions to be considered. *First*, are the decrees in the Idaho Fruit Lands Company Case, in which the receivership certificates were issued, and in the foreclosure suit, valid or void? If they are void as we claim they are, then they are not binding upon us, and no lapse of time falling short of the statute of limitations or laches, will bar us from instituting this suit to recover that which has been taken from us by *fraud*. And *second*, if said decrees are void can this Court give us any relief?

Before engaging in a discussion of these two points, it may be well to dispose of one preliminary issue. The complaint in the within suit mentions in several paragraphs the various decisions of the State Courts of Idaho. Counsel for defendant will no doubt refer to the language of these decisions, and particularly to the decisions of the Supreme Court of Idaho. We must object to this, as this is a motion to dismiss plaintiff's complaint and for that reason we must be limited to the allegations and language therein employed. The truth or falsity of the allegations of the bill is a matter of proof, which the Court cannot determine or go into at this time, for their truth, under defendant's motion to dismiss, stand expressly admitted. Whether those various decrees or decisions are or are not conclusive upon us is the very issue in this case and the Court has no right to decide this question in advance of the trial. To de-

termine this issue we are entitled to submit to the Court the pleadings, proof, findings and decrees in those various cases. Whether a certain matter has been decided or could have been decided in a given case, unless it appears on the face of the pleadings, is a question of *Fact, not of law*. "When a former judgment is set up as a bar or estoppel, the question whether there is such an identity of the parties and of the subject-matter and cause of action as will support a plea of *res adjudicata* is a question of law for the Court *when* it is determinable from an inspection of the record alone, but if extrinsic evidence is required to effect the necessary identification, it becomes a question of fact and must go to the jury." (23 Cyc. 1543.)

And in an equity case these matters would be decided by the Court at the trial as *questions of fact*, not as questions of law. Neither can this Court take judicial notice of the various decisions of the Supreme Court of Idaho, although such decisions are referred to in the pleadings. (16 Cyc. 919 (II); 131 U. S. 151.)

Therefore, for the purpose of this appeal, we are restricted to the language of the bill. Let us now consider the validity of the decree of the Court in case of Idaho Fruit Lands Company vs. Great Western Beet Sugar Company as it appears in the complaint. Omitting immaterial parts, paragraph VIII of the complaint reads: "That *before* said foreclosure suit was filed or had gone to judgment or decree Idaho Fruit Lands Co. filed an action in the District Court for Elmore County, against defendant Great Western Beet Sugar Company and others to determine the interest

of said Idaho Fruit Lands Company in and to the irrigation systems of the Great Western Beet Sugar Co., and that Norman Isaachson was appointed receiver in said cause, *which said action was filed after this plaintiff had duly recorded his mortgage, and after the lien of said mortgage had attached to the property hereinbefore described.* That although plaintiff herein was at the time of the institution of said suit by Idaho Fruit Lands Co., a *lien holder prior in time, plaintiff was neither made a party to said suit, nor served with process therein, nor did he have knowledge of the institution or pendency of said suit.* That while said Norman Isaachson acted as such Receiver, he issued Receiver's certificates to the amount of \$17,675.00, thereafter filed his account, and before said certificates were paid, was discharged by said Court as such Receiver."

This plaintiff not having been served with process or having been made a party to this suit of Idaho Fruit Lands Co. is not bound by said judgment, as far as he is concerned this decree is a nullity, for jurisdiction of the person is essential to the validity of a judgment, and a judgment rendered against one who was not made a party to the action, or not duly cited, is void. (23 Cyc. 683, and notes; 30 Cent. Digest, Judgments, Sec. 24.)

This judgment obtained by the Idaho Fruit Lands Company is not pleadable in bar nor admissible in evidence against us, for we were strangers to the litigation in which said judgment was rendered. (23 Cyc. 1280, 12.)

“It is a rule of universal application that the rights of no one shall be concluded by a judgment rendered in a suit to which he is not a party, and that a party cannot be bound by a judgment without being allowed a day in Court.”

He must be cited or have made himself a party in order to authorize a judgment against him. (XI Enc. Pl. and Pr. 842.)

Even if the Court had considered in this suit of Idaho Fruit Lands Company plaintiff's mortgage, yet he would not be bound by such a decision for “persons having liens upon or claims to property which is the subject-matter of an action, or rights of action against one or more of the parties thereto, are not bound by the judgment if they were not made parties to the suit, although their claims were brought into issue in such action, or although their rights depend upon the same transaction or facts which were litigated and decided in that action. (23 Cyc. 1237b; 30 Cent. D. Judgments, Sec. 1179.)

If said judgment is valid at all, it is only valid between *the parties*, but so far as this plaintiff is concerned, he not being a party to it, it is of no effect whatever and absolutely *null and void*.

In the case of METROPOLITAN TRUST COMPANY VS. LAKE CITIES ELECTRIC COMPANY, 100 Federal 897, plaintiff filed a bill of foreclosure of mortgage executed by defendant Lake Cities Electric Company. The Circuit Court of the State of

Indiana had taken possession of the street railway of the defendant, issued receiver's certificates, and made them a lien on the plant and property. The plaintiff herein was not made a party in the state Court, the parties therein being the John Davis Company and the Lake Cities Electric Company. Certain defendants demurred to the complaint herein, contending that the United States Court could not determine the relative rank of the receiver's certificates and the Trust Company's mortgage. The *Court* held that as to mortgagees or creditors *not before the State Court*, it could not make any valid order adjudging the rank or priority of such certificates. The question was not before the State Court because it had no jurisdiction over such mortgagees or creditors and its order or decree, if any, as to them would be a nullity. Demurrer overruled. **THIS CASE IS ON ALL FOURS WITH THE ONE AT BAR**, and the facts therein are identical with the facts pleaded in our complaint.

In *Union Trust Company vs. Illinois Midland Railway Co.*, 117 U. S. 434, the United States Supreme Court said: "The principles applicable to this branch of the case were well expressed by Mr. Justice Harlan in his opinion of February 29th, 1884, as follows: 'Those who take receiver's certificates must be deemed to have taken them subject to the rights of the parties who have **PRIOR LIENS** upon the property. While the Court, under some circumstances and for some purposes, and in advance of the prior lien holders being made parties, may have jurisdiction to charge the property with the amount of the receiver's certificates issued by its au-

thority, IT CANNOT WITHOUT GIVING SUCH PARTIES THEIR DAY IN COURT DEPRIVE THEM OF THE PRIORITY OF THEIR LIEN.

When such prior lien holders are brought before the Court, they become entitled upon the plainest principles of justice and equity to contest the validity, effect and amount of all such certificates as fully as if such questions were then presented for the first time for determination. If it appears that they ought not to have been made a charge upon the property superior to the lien created by the mortgage, then the contract rights of the prior lien holders must be protected. Of these rules the party who inaugurated this litigation cannot justly complain. They were not in ignorance of the fact that there were existing mortgages upon this property, and that fact should have been brought to the attention of the Court at the very outset’.”

These decisions are leading cases on this subject and ought, therefore, to be the rule in this case.

We now pass to the decree in the foreclosure suit of Henry Hewitt, Jr., vs. Great Western Beet Sugar Company, et al. In paragraph IX of appellant’s complaint it is alleged that said District Court of Elmore County (in which said foreclosure suit was pending) decreed that said mortgage be foreclosed and that Henry Hewitt, Jr., have judgment against Great Western Beet Sugar Company in the sum of \$109,275, which said decree likewise declared certain other liens other than receiver’s certificates to be prior liens to plaintiff’s mortgage, whose priority plaintiff has always ad-

mitted, the owners of said liens having filed cross-complaints.

With this, however, the trial Court was not satisfied. Of its own volition it constituted itself guardian of the respective litigants and on its own motion injected an issue into the case, which the parties by the pleadings and during the trial had either failed or refused to raise. To follow the language of the complaint, omitting only such portions as are immaterial for the present purpose—Section X.

“ That although the validity or priority of said receiver’s certificates amounting to said sum of \$17,675.00 was not made an issue in the pleadings in said foreclosure suit of Henry Hewitt, Jr., against Great Western Beet Sugar Company, and although the validity and priority of said receiver’s certificates were not raised during the trial of said foreclosure suit, said District Court who was trying said cause, *on its own motion*, wrongfully, unlawfully and in excess of its jurisdiction and in deprivation of the rights of this plaintiff held in its written opinion and decree, among other things, that said receiver’s certificates so issued by Norman Isaachson were, and declared them to be a prior lien to all other liens against said property including said \$80,000.00 mortgage so held by this plaintiff.”

In this, we claim the Court not only erred, but such usurpation of power rendered said decree in said foreclosure suit absolutely null and void.

At the time plaintiff instituted his foreclosure suit, said receivership certificates were not as yet in exist-

ence, therefore we could not have made the holders thereof parties. The complaint denies that we had any actual knowledge of the pendency of said suit, and this allegation is admitted by defendant's motion to dismiss. On the other hand, our mortgage being of record at the time the Idaho Fruit Lands Co. case was instituted, the plaintiff in that suit, if it desired to cut off our priority, should have made Henry Hewitt, Jr., a party defendant for the Idaho Fruit Lands Company had actual and constructive notice of his lien. (117 U. S. 434 supra.) How do we know, how does this Court know, that Idaho Fruit Lands Co. did not desire to acknowledge our priority of claim, and merely ask to have its rights determined subject to our mortgage? Every litigant has the right to pursue his own theory of his case. The theory made out by his complaint governs, upon it he must win or fail, and no Court has the right to change that theory for or against him. (See Article Theory of Case, XXI Enc. of Pl. and Pr. 649.)

If we had knowledge of said suit then we had a right to accept the theory made out in the complaint of Idaho Fruit Lands Company and govern ourselves accordingly. If it chose to foreclose its rights subject to ours it had a right to do so. In the case of Metropolitan Trust Co. vs. Lake Cities Electric Co., supra, it was expressly held that the expenses of a receivership could NOT be declared to be a prior lien to a mortgage, where the mortgagee was not made a party. Therefore, when the Court attempted to make said receiver's certificates a prior lien to our mortgage by inserting in the decree of foreclosure a decree in a case to which we were not

a party, the Court attempted to do indirectly what it could not do directly, it gave the suit of Idaho Fruit Lands Co. a different theory than made out by the pleadings, *and by declaring the lien of the certificates to be prior to our mortgage, which was prior to the certificates in time, it deprived this plaintiff of his right to contest the validity of said certificates, and by declaring them to be a prior lien, deprived this plaintiff of the priority of his mortgage and deprived him of his property without due or any process of law.*

To the foreclosure suit the various lien holders in whose favor said receiver's certificates were issued, *were not parties* and the decree of the court in favor of such persons amounts to, and is a decree in favor of parties who were not parties to the suit. No more can a court render a judgment in favor of one not a party, than it can render a judgment against one not a party.

Says the Court in the case of Dunlap vs. Sutherland, 63 Texas 38: "A judgment rendered against a person not before the Court would be void, and it is not perceived that a judgment against a defendant in Court at the suit of named plaintiff's upon a cause of action accruing to them alone, in favor of a person in no manner a party to the action, can stand upon any higher ground. Courts have no more power, until their action is called into exercise by some kind of pleading, to render a judgment in favor of any person, than they have to render a judgment against a person until he has been brought within the jurisdiction of the Court in some manner recognized by law as sufficient."

We have therefore in the foreclosure suit a decree which professes to be valid as far as appellant's rights are concerned, but void, so far as the holders of these various liens are concerned. Such a thing is an anomaly. A decree must be valid or void as a whole, and if it is a nullity as to some of the parties affected, it is likewise a nullity as to ALL.

But there is another reason why this decree is void. It is well settled law that each judgment must be supported by appropriate findings of fact or a verdict, and each verdict or finding of fact in turn must be supported by the pleadings and proof. As stated before, the issue of the priority of said receiver's certificates was not raised by the pleadings in the foreclosure suit, nor during the trial of said cause, but the Court on its own motion, and entirely unsupported by the pleadings or proof injected that issue into the case. The majority of decisions hold that this action on the part of the Court rendered the entire decision *void*.

Judgments must be responsive to the issues presented in the pleadings, and as has been seen, must respond to and determine all the issues.

"Issues not raised by the pleadings will not be determined. A judgment based upon issues not made by the pleadings is coram non judice and *void*, and subject to be set aside or disregarded even in a collateral proceeding."

The leading cases on the subject are the case of *Munday v. Vail*, 34 N. J. L. 418, and *Reynolds v. Stockton*,

43 N. J. Equity, 211, which latter case, being appealed to the Supreme Court of the United States, will be found also in 140 U. S. 254.

This case arose out of a conveyance from Asa Munday and wife to John Conger, of certain property in trust for Asa Munday and wife. After said conveyance Ephraim Munday, a brother of Asa Munday, brought a suit against Asa Munday for money loaned prior to said conveyance, and asked for a decree declaring said trust deed to be fraudulent as against his judgment. The Court gave him a judgment for the amount loaned and further entered a decree declaring said trust deed null and void and of no effect as against everybody. The property was sold on execution, and the present suit was brought by the surviving heir of Asa Munday and wife to recover the property. Plaintiff in the present suit was a defendant in the suit instituted by Ephraim Munday, and yet the court held that when the court rendered a decree declaring the deed null and void and of no effect as against everybody, it decided an issue which was not in said case, which rendered said decree null and void. The only issue in that case being whether or not said trust deed was void or not as against Ephraim Munday. Says the Court in that case:

“From the statement of fact prefatory to this opinion, it appears that Asa Munday settled his property in trust for the use of himself and wife and the survivor, for life, with remainder to his children. Asa Munday is dead, Matilda Vail, the plaintiff in the court below, being his sole issue. To her the widow and trustee released or conveyed their title and right in the premises. The defend-

ant holds the property by virtue of a sheriff's sale, under a decree for costs against Asa Munday, made a long time after the above-mentioned deed of trust. It, therefore, is apparent that if the trust estate was existent at the time of this sale by the sheriff, the plaintiff's title is unquestionable. The case turns upon this point. The defense claims that this deed of trust and all right under it were destroyed and annulled by the decree of the Court of Chancery, in the suit wherein Ephraim Munday was the complainant. The legal validity and effect of that decree is the point to be settled.

“ It is obvious at a glance, that this decree, so far as it affects the present question, is a most extraordinary one. My respect for the court, and for the counsel engaged in these proceedings, lead me to the conviction that it was the result of inadvertence. It is opposed to the well-settled practice of courts of equity and to the commonest principles of justice. This certainly is clear, when it is said that its effect is, if it have validity, to deprive an infant defendant of an estate vested in her, without an issue or a hearing with respect to her rights. The case made by the bill was this: The complainant alleged that he had loaned money on a promise of security in the form of a mortgage on certain land, and that the borrower, in disregard of such contract, had conveyed away such land in trust for himself and wife, for life, with remainder to his children, and he asked that such trust should be declared void with respect to his claim. No one will maintain that either the prayer of the bill or the decree founded upon these facts could properly go beyond this. The creditor had no standing to ask that the deed of trust should be annulled as between the trustee and the *cestuis que trust*. If admitted to be fraudulent with respect to creditors even, the statute of frauds ordains its validity so far as relates to the parties to it. Such, likewise, is the admitted rule in equity. But in this case the decree does, in very unambiguous language,

pronounce and adjudge the conveyance in trust to be invalid, not only so far as to let in the claim of the complaining creditor, but out and out as between the trustee and the parties beneficially interested. If legal, its effect was to destroy the estates of the cestuis que trust and to revert the title in fee in the settlor.

“ The counsel for the defense did not attempt to maintain the propriety of such a decree, but argued that if erroneous, it could not be called in question in this collateral suit. Cases were cited to sustain this position. But these decisions are all to the effect that the judgment or decree of a court having jurisdiction over the controversy and the parties cannot be impeached for error, except in a direct proceeding for that purpose. The proposition has long since taken its place among the settled maxims of law. The only question is whether it applies to the present case. If the Court of Chancery, in the case under review, had the power to make the decree in question, the legal rule thus invoked must prevail; but if the court had no such power, the rule is not applicable. The inquiry is, had the court jurisdiction to the extent claimed?

“ Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this, there are three essentials: First, the Court must have cognizance of the class of cases to which the one to be adjudged belongs. Second, the proper parties must be present. And third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with reference to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment.

It is impossible to concede that, because A and B are parties to a suit, that a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons by becoming suitors, do not place themselves, for all purposes, under the control of the court, and it is only over these particular interests which they choose to draw in question, that a power of judicial decision arises. If, in an ordinary foreclosure case, a man and his wife being parties, the Court of Chancery should decree a divorce between them, it would require no argument to convince everyone that such decree, so far as it attempted to affect the matrimonial relation, was void; and yet the only infirmity in such a decree would be found, upon analysis, to arise from the circumstances that the point decided was not within the substance of the pending litigation. In such a case the court would have acted within the field of its authority, and the proper parties would have been present; the single but fatal flaw having been the absence from the record of any issue on the point determined. The invalidity of such a decree does not proceed from any mere arbitrary rule, but it rests entirely on the ground of common justice. A judgment upon a matter outside of the issue must, of necessity, be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. The records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with reference to the substance of the controversy and its essential concomitants. Thus, Lord Coke, treating of this doctrine, says, "a matter alleged that is neither traversable nor material shall not estop." Co. Litt, 352b. And in the note to the *Duchess of Kingston's* case in 2 Smith's Lead. cases 535, Baron Comyn is

vouched for the proposition that judgments 'are conclusive as to nothing which might not have been in question, or was not material.' For the same doctrine, that in order to make a decision conclusive not only the proper parties must be present, but that the court must act upon 'the property according to the rights that appear' upon the record, I refer to the authority of Lord Redesdale. *Gifford v. Hort*, 1 Sch. and Lef. 408. See also *Gore v. Sackpole*, 1 Dow. 30, *Colclough v. Sterum*, 3 Bligh. R. 186. In *Curtis vs. Price*, 12 Ves. 102, Sir William Grant appears in a collateral proceeding to have looked into a decree to see how far it had been warranted by the matters in litigation.

"The case which I find most nearly in point is that of *Corwithe v. Griffing*, 21 Barb. 9. Commissioners in partition, in their distribution, embraced land other than that contained in the petition, and the court confirmed their report, and it was held that such judgment was a nullity, 'as the jurisdiction was confined to the subject-matter set forth and described in the petition.' In this case the court had jurisdiction in cases of partition, and the decision was upon the ground that the decree was void, as it was aside from the issue which the proceedings presented.

"None of these cases are directly in point, but they tend to establish the general proposition that a decree or a judgment can have no force which is not appropriate to any part of the matter in controversy before the court. In the present instance the deed of trust in question, as it regards the parties to it, was not by any one called in question; the defendants to this chancery suit did not ask for any adjudication upon their rights, and when, consequently, the court undertook to decide and conclude such rights, such act was clearly *coram non iudice*, and was consequently void. Such a decree could not impair the rights of the infant defendant who is the plaintiff in this suit; the estate did not revert, by force of such decree, to the settlor, and the con-

sequence is, the sale by the sheriff under the execution against such settlor, could not disturb the limitations of the trust conveyance."

Reynolds v. Stockton is another case of equal force.

"The appellants in this proceeding commenced an action, in February, 1879, in the Supreme Court of New York, against the Hope Life Insurance Company, John F. Smyth, then superintendent of the insurance department of New York, Joel Parker, receiver, and the New Jersey Mutual Life Insurance Company. Joel Parker was then acting receiver of the last mentioned company under appointment of the Court of Chancery of New Jersey, and also ancillary receiver under appointment by the Supreme Court of New York, to determine who was entitled to the fund deposited with the New York Superintendent of insurance by the Hope Company. The New Jersey company claimed it under its agreement to reinsure the Hope Company. Joel Parker, as receiver, and the New Jersey Company filed an answer in which that is the only issue made. No amendment was subsequently made to the pleadings and no further answer filed by said receiver of said company. The case was referred, and on the 7th of March, 1885, a decree was made adjudging the relative interests of the parties in the deposit funds.

"On the 11th of October, 1886, after the discharging of the receiver in New York, a further proceeding was taken in the aforesaid suit in New York, without in any wise amending the pleadings, and without further answer or appearance on the part of Parker, re-

ceiver, or the New Jersey Company, in which it was adjudged that the plaintiff in said proceeding recover of Joel Parker, as receiver of the New Jersey Mutual Life Insurance Company, the sum of \$1,010,496.29. This claim was presented to Robert F. Stockton, receiver of the New Jersey Company, and by him rejected, on the ground that the New York adjudication did not constitute legal proof of the alleged indebtedness. On appeal to the Court of Chancery the action of the receiver was sustained, and the appellants dismissed without relief.

Says the Court: "The question presented by the appeal to this court is whether to the decree of the New York court the conclusive force and effect of a judgment must be accorded.

"That question is distinctly presented in *Munday v. Vail*, 5 Vr. 418, where it is held by the Supreme Court of this State that a decree which is entirely aside of the issue raised in the record is invalid, and will be treated as a nullity, even in a collateral proceeding.

"A decree or judgment which is not appropriate to any part of the matter in controversy before the court can have no force. The matter in controversy is that exclusively which is presented by the pleadings and the issue framed thereby.

"The object of the New York suit was fully accomplished, so far as the pleadings disclosed its purpose, when the New York fund was disposed of. There was an entire absence of such specific allegations in the complaint as were necessary to put the receiver of the New Jersey company on his defense in respect to the state of the account between that company and the Hope company.

“The decree in New York, having adjudicated a matter not presented by the pleadings nor within the issue, can have no higher effect than a judgment rendered in our own courts under like conditions. Under the authority of *Munday v. Vail*, it must be treated as a nullity.”

On appeal to the United States Supreme Court the judgment of the New Jersey Chancery Court was affirmed (140 U. S. 254), and Mr. Justice Brewer delivering the opinion of the Court, among other things said as follows: (The Supreme Court in its opinion quotes at length some of the language already cited in the cases of *Munday vs. Vail* and others. We tried, but found it practically impossible to omit these passages already quoted, without breaking the continuity of language and the force of reasoning. We beg to offer this apology for asking the Court to read twice parts of the authorities.—Attorneys for Appellants.)

“We are of opinion that the decision of the Chancery Court of New Jersey, as sustained, by the Court of Errors and Appeals of that State, is correct, and must be affirmed. The first and obvious reason is that the judgment of the Supreme Court of New York was not responsive to the issues presented. If the fact of a judgment rendered in a Court of one state does not preclude inquiry in the courts of another, as to the jurisdiction of the court rendering the judgment over the person or the subject-matter, it certainly also does not preclude inquiry as to whether the judgment so rendered was so far responsive to the issues tendered, by the pleadings as to be a proper exercise of jurisdiction on the part of the court rendering it. Take an extreme case: Given a court of general jurisdiction, over actions in ejectment as well as those

in replevin; a complaint in replevin for the possession of certain specific property personal service upon the defendant, appearance and answer denying title; could (there being no subsequent appearance of the defendant and no amendment of the complaint) a judgment thereafter rendered in such action for the recovery of the possession of certain real estate be upheld? Surely not; even in the courts of the same state. If not there, the constitutional provision quoted gives no greater force to the same record in another state.

“ We are not concerned in this case as to the power of amendment of pleadings lodged in the trial court, or the effect of any amendment made under such power, for no amendment was made or asked. And without amendment of the pleadings, a judgment for the recovery of the possession of real estate, rendered in an action whose pleadings disclose only a claim for the possession of personal property, cannot be sustained, although personal service was made upon the defendant. The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted. Nor are we concerned with the question as to the rule which obtains in a case in which, while the matter determined was not, in fact, put in issue by the pleadings, it is apparent from the record that the defeated party was present at the trial and actually litigated that matter. In such a case the proposition so often affirmed, that that is to be considered as done which ought to have been done, may have weight, and the amendment which ought to have been made to conform the pleadings to the evidence may be treated as having been made. Here there was no appearance after the filing of the answer, and no participation in the trial or other proceedings. Whatever may be the rule where

substantial amendments to the complaint are permitted and made, and the defendant responds thereto, or where it appears that he takes actual part in the litigation of the matters determined, the rule is universal that, where he appears and responds only to the complaint as filed, and no amendment is made thereto, the judgment is conclusive only so far as it determines matters which by the pleadings are put in issue. And this rule, which determines the conclusiveness of a judgment rendered in one court of a State, as to all subsequent inquiries in the courts of the same state, enters into and limits the constitutional provision quoted, as to the full faith and credit which must be given in one state to judgment rendered in the courts of another state.

“ In the opinion of the Court of Errors and Appeals, the case of *Munday v. Vail*, 34 N. J. Law, 418, is cited. In that case the proposition stated in the syllabus, and which is fully sustained by the opinion, is, that ‘a decree in equity, which is entirely aside of the issue raised in the record, is invalid, and will be treated as a nullity, even in a collateral proceeding.’ It appeared that on May 12, 1841, Asa Munday, the owner, with his wife, Hetty Munday, conveyed the premises for which the action (which was one of ejectment) was brought, to John Conger, upon the following trust, to-wit: ‘for the use and benefit of said Asa Munday and wife, and the survivor of them, with the remainder to the children of said Asa Munday and wife, in equal parts and shares, in fee.’ Plaintiff was the sole surviving issue of Asa Munday and Hetty Munday, and took, under the facts, all the title which, on the 12th of May, 1841, was vested in Asa Munday. On January 16, 1844, Ephraim Munday filed his bill in the Court of Chancery, setting forth that he had loaned certain moneys to Asa Munday upon an agreement that he, the said Asa, would secure said loan by a mortgage upon his land, including the premises in question; and that Asa, in

violation of his agreement, and to defraud him of his rights, had conveyed them away to John Conger, upon the trust already mentioned. The bill also showed that plaintiff had obtained judgment for his deed. The prayer was, 'That the deed of conveyance of said lands so made by the said Asa Munday and Hetty, his wife, to the John Conger, and the said deed and declaration of trust so made and executed by the said John Conger and wife as aforesaid, may, by the order and decree of this honorable court, be set aside and declared to be fraudulent and void against the said judgment and writ of execution of your orator, and that the said judgment and execution of your orator may be decreed a lien on said lands and tenements so conveyed to said John Conger,' etc. Plaintiff was a defendant in that action, and then an infant, appeared by her father as guardian. The decree, which was entered on the 15th of December, 1846, was generally that the said deed from Asa Munday and wife to Conger was fraudulent, null and void, and of no force whatever in law or equity; and ordered and adjudged that it be delivered up to be cancelled; and further, that the plaintiff's judgment is and was a lien. No proceedings were had under this decree, the money due plaintiff having been paid or secured to him. Subsequently, and on September 15th, 1851, a decree for costs against Asa Munday, in another suit, was entered in the Chancery Court. Upon such decree the property in question was levied upon and sold to defendant. The validity of the title acquired by this proceeding was the matter in controversy. The title of plaintiff was good under the trust deed of May 12, 1841, unless defeated by this sale and the deed made thereon; and defendant's title, adverse to plaintiff's, depended on the question whether the decree of December 15th, 1846, was valid to the extent of its language, annulling absolutely the conveyance from Asa Munday and wife to John Conger, and directing the surrender of such deed, or, notwithstanding its general language, was to be limited to the matters

of inquiry presented by the complaint and answer, and, therefore, simply an adjudication that the deed was voidable, and annulling it so far as it conflicted with the rights of plaintiff in that suit, leaving it to stand good as a deed *inter partes*, and valid as to all other parties. It was held that the latter was the true construction, and that the general language in the decree was limited by the matters put in issue by the pleadings. We quote from the opinion: 'The inquiry is, had the court jurisdiction to the extent claimed? Jurisdiction may be defined to be the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and third, the point decided must be, in substance and effect, within the issue. That a court cannot go out of its appointed sphere, and that its action is void with respect to persons who are strangers to its proceedings, are propositions established by a multitude of authorities. A defect in a judgment arising from the fact that the matter decided was not embraced within the issue has not, it would seem, received much judicial consideration. And yet I cannot doubt that, upon general principles, such a defect must avoid a judgment. It is impossible to concede that because A and B are parties to a suit, a court can decide any matter in which they are interested, whether such matter be involved in the pending litigation or not. Persons becoming suitors do not place themselves for all purposes under the control of the court, and it is only over these particular interests, which they choose to draw in question, that a power of judicial decision arises.' And again: 'A judgment upon a matter outside of the issue must, of necessity be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect

to matters adjudicated. And this is the principal reason why judgments become estoppels. The record or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with reference to the substance of the controversy and its essential commitments. Thus Lord Coke, treating of this doctrine, says: 'A matter alleged that is neither traversable nor material shall not estop.' Co. Litt. 352b. And in a note to the *Duchess of Kingston's* case, in 2 Smith's Lead. cases 535, Baron Comyn is vouched for the purpose that judgments 'are conclusive as to nothing which might not have been in question, or were not material.' For the same doctrine, that in order to make a decision conclusive not only the proper parties must be present, but that the court must act upon 'the property according to the rights that appear' upon the record, I refer to the authority of Lord Redesdale. *Giffard v. Hort*, 1 Sch. & Lef. 386, 408. See also *Gore v. Stacpoole*, 1 Dow. 18, 30; *Colclough v. Sterum*, 3 Bligh. 181, 186.' Reference is made in the opinion to the case of *Corwithe v. Griffing*, 21 Barb. 9, in respect to which the court said: 'Commissioners in partition, in their distribution, embraced land other than that contained in the petition, and the court confirmed their report, and it was held that such judgment was a nullity,' as the jurisdiction was confined to the subject-matter set forth and described in the petition. 'In this case the court had jurisdiction in cases of partition, and the decision was upon the ground that the decree was void, as it was aside from the issue which the proceedings presented.'

"This case is very much in point. We regard the views suggested in the quotation from the opinion as correct, and as properly indicating the limits in respect to which the conclusiveness of a judgment may be invoked in a subsequent suit inter partes."

“ But without multiplying authorities, the proposition suggested by those referred to, and which we affirm, is, that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of adjudication between the parties, it must, without limitations heretofore stated, be responsive to the issues tendered by the pleadings. In other words, that when a complaint tenders one cause of action, and in that suit service on, or appearance of, the defendant is made, a subsequent judgment therein, rendered in the absence of the defendant upon another and different cause of action than that stated in the complaint, is without binding force within the courts of the same state; and, of course, notwithstanding the constitutional provision heretofore quoted, has no particular standing in the courts of another state.

“ This proposition determines this case; for, as has been shown, the scope and object of the suit in the New York court was the subjection of the fund in the hands of the superintendent of the insurance department of that State to the satisfaction of claims against the New York Company. The cause of action disclosed in the original complaint was not widened by any amendment; and there was no actual appearance by the receiver Parker or the New Jersey Company subsequent to the filing of this answer. No valid judgment could, therefore, be rendered therein; which went beyond the subjection of this fund to those claims.”

In the case of *Corwithe v. Griffing* (21 Barb. 2), referred to in the decision of the Supreme Court of the United States in the case of *Reynolds v. Stockton*, plaintiffs attacked a judgment in a partition suit which included party property not mentioned or described in the petition. The court held that a decree in partition being in rem, must stand or fall as a unit, and as the decree included property which was not included in the

petition, it rendered the decree null and void. The court in delivering its opinion among other things says as follows:

“ But if the plaintiffs are correct in the point that the Court of Common Pleas exceeded its jurisdiction, the judgment was a nullity; and as the lands allotted to the defendants or those under whom they claim have not been held in severalty for a period of 20 years, it is not too late to assert and maintain their injured rights. The suit in partition was, as the plaintiff’s counsel justly remarked, on the trial, in rem. In such cases the jurisdiction of the court (particularly if it is not a special statutory proceeding) was confined to the subject-matter set forth and described in the petition. There is no principle of law or justice which could or should extend it any further. The petition announces to the parties defendant that a partition is demanded of the land which it describes. The defendants act upon that supposition. If the lands and estates of the owners are correctly described no resistance is usually made to the application. In this case the defendants signed a cognovit, acknowledging the correctness of the allegations contained in the petition, and consenting that partition should be made of the land therein described. The judgment that partition should be made was founded upon the confession, and was of course limited by it. The court had no authority to go beyond it. The commissioners did not partition the tract described in the petition, but extended their action to land consisting partly of the eastern portion of such tract and partly of other property. Clearly the court had no jurisdiction, nor could it confer any upon the commissioners, over the lands allotted to William and Nathan Corwith, and so far the action of each was null and void. The same objection is, in my opinion, applicable to the entire allotment. The partition was a unity, and could not be so severed as to save one

part whilst the other was lost. The whole must stand or fall together. A division cannot be made pursuant; to the statute, except of the entire tract. The quantity and quality of the whole and relatively of each part must be considered; and that can be done only when the estimate is applied to the identical tract and its various parts. I do not mean to say that every trivial variation will avoid the proceedings. The principle is not so stringent. The maxim *de minimus non curat lex* would be applicable to them as well as to other matters. But in this instance the variance goes to the entire portions allotted to at least two of the parties. It is too essential, and it would, if it should prevail, operate too unequally, to allow it to stand.

“In many instances where a court exceeds its jurisdiction the judgment is simply void and of no effect, and the interposition of a court of equity is not necessary to prevent its operation. That, however, applies only to cases where the defect is manifest upon the record. Where it is not, and it is necessary to resort to exterior evidence to show it, as in this case, the judgment is a cloud upon the title to real estate, which can be dissipated only by a court of equity; and in such cases the injured party has a right to invoke the interference of such court for a protection.

“The plaintiffs in this case ask, in addition, that this court will now order a partition between the parties. That cannot be done in this suit, nor do I think that it should be attempted until the dispute in respect to the boundaries shall be definitely settled between the present parties and the owners of the adjoining lands. Such boundaries cannot be settled (except so far as it relates to the owners of this tract among themselves) without calling in other parties.

“It must be decreed that the allotment made by the commissioners in partition, and the judgment of the court of common pleas of Suffolk County confirming it, are null and void and of no effect.”

Another case, exactly in point, is the case of *West vs. Shurtliff et al.*, 28 Utah 337 (79 Pac. 180).

These cases proceed upon the theory that a court has no jurisdiction to pass upon questions not submitted to it by the parties for decision. A suit for the foreclosure of a mortgage is, like a partition proceeding, a suit in rem, and for that reason we urge, as was said in the case of *Corwithe v. Griffing*, supra, that such decree must stand or fall as a unit.

Cyc. Vol. 23, page 816, and subs. lays down the same rule. "A judgment must accord with and be warranted by the pleadings of the party in whose favor it is rendered, if it is not supported by the pleadings it is fatally defective. To render a valid judgment the Court must have jurisdiction not only of the parties, and the general subject-matter, but also of the particular question involved, which it assumes to decide or of the particular remedy or relief which it assumes to grant; and a judgment of a Court upon a subject which may be within its general jurisdiction, but which is not brought before it by any statement or claim of the parties, and is foreign to the issues submitted for its determination, is void. We therefore maintain that the judgment is *void* and not *res adjudicata* on account of including issues not made by the pleadings.

Now, what effect if any has the affirmance of a void decree by the Supreme Court of Idaho, upon this plaintiff.

"A void judgment cannot be made valid and op-

erative by its subsequent approval by the judge, by his approval of a sale on execution held under it (28 Ore. 485), by afterwards supplying the elements which were lacking to its validity, by a subsequent proceedings instituted for that purpose in a court of equity, by citing a party against whom it was entered to show cause why it should not be declared valid, by a revival of the judgment, *or by the taking of an appeal from it, or even by an affirmance on appeal.* (23 Cyc. 698.)

Therefore, when the Supreme Court of Idaho affirmed these two void judgments it affirmed two nullities, it added nothing, it left the decrees what they were before, null and void.

Closely related to the preceding question is the consideration of the denial by the Supreme Court of Idaho of our writ of prohibition. The writ of prohibition amounted to nothing other than a collateral inquiry into the validity of the two decrees. If these could not be validated by a direct proceeding, namely, by an appeal to and affirmance by the Supreme Court, then how can the Supreme Court of Idaho do in an indirect way, what it could not do directly, by declaring said two decrees to be valid and refusing to restrain the sale of the property in pursuance of the two void decrees? If the Supreme Court was powerless to declare such two decisions valid in a direct proceeding on appeal, it certainly would be more powerless to declare them valid in an indirect or collateral proceeding, and the reasons and authorities assigned against the validity of said judg-

ments on appeal are of equal force against the validity of the judgment in the writ of prohibition.

Having proven that the decree in the foreclosure suit is void we now pass to the question: Will this void decree sustain a judicial sale held in pursuance thereof? In Vol. 24, Cyc. 6, the rule is laid down as follows: "In order that a judicial sale may be validly made it is necessary that the Court by which it was ordered shall have the general power to decree a sale, and that in a particular case the jurisdiction of the Court over the subject-matter shall have been acquired in a proper manner." To the same effect, see Vol. XVII, Am. and Eng. Enc. of Law, 956. "In order to constitute a valid sale by virtue of which the purchaser can acquire title to the property sold, it is absolutely necessary that the Court ordering the sale should have had power to take cognizance of the matter brought before it in the proceedings in which the sale was ordered, and should have acquired jurisdiction in the particular case by one of the various methods recognized by law" This proposition is elementary and hundreds of cases bear out this rule.

Neither can this void sale be validated by the action of the Supreme Court of Idaho in overruling our objections to said sale, and affirming the confirmation thereof. If the sale was *void*, and we claim it was and is, it would remain void, and the order of confirmation would add nothing, but be likewise a nullity.

The confirmation of a judicial sale cures all irregularities in the proceedings leading up to the conduct of

the sale. *But it cannot cure jurisdictional defects or otherwise validate a void sale.* (XVII Am. and Eng. Enc. of Law, 993.)

“The order of confirmation gives to the sale the judicial sanction of the Court, and then it relates back to the time of the sale and cures all defects and irregularities, except those founded on want of jurisdiction or fraud; and confirmation does not validate a sale that is void from want of jurisdiction or otherwise.” (13 Cyc. 36.)

We now approach the point whether a Court of Equity has power to grant us any relief. Here again one must draw the vital distinction between erroneous or irregular judgments and *void* judgments. Judgments or decrees which are merely irregular or erroneous are binding upon the parties until vacated, set aside, modified or reversed by the higher court. The parties to such a decree can be afforded relief only by appeal, writ of error or certiorari. But not so with a *void* judgment. Such a judgment, as we have heretofore seen, is a mere nullity. To rid oneself of such a decree, the losing party has two remedies, which are concurrent—he can either appeal and take his chances on having the appellate court reverse the judgment, or he can bring an independent suit in Equity to set it aside and restrain its enforcement. The judgment or decree, though void, “is so far to be considered in existence by the appellate court that it may be reviewed and reversed, and the parties restored to the positions they originally occupied.” (2 Cyc. 590h.)

This is the rule in Alabama, California, Colorado, Connecticut, Georgia, Illinois, Indiana, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, New Mexico, New York, North Carolina, Oregon, Tennessee, Texas, Washington, West Virginia, Wisconsin and the United States:

Wilson vs. David, 3 Dall. (U. S.) 401.

Baber vs. Power, 124 U. S. 167 (85 Ct. 416).

As the Appellate Court could not imbue the void decree with validity by an affirmance, appellant has lost nothing if the Appellate Court does affirm it. He has simply pursued the path of safety by first resorting to a remedy which he had to exercise under the statute within a short, limited time. The Court having failed to give him the desired relief, and being powerless to validate the decree by an affirmance, left appellant with his remedy in Equity intact. Equity always has had and still has the power to enjoin the enforcement of a judgment which is absolutely and entirely void. And especially so, if the judgment is regular on its face and does not disclose the grounds of its invalidity.

Practically the only remaining question of importance under this heading is *whether a federal court has the power to vacate or enjoin a judgment or decree rendered in a state court*. Again referring to Cyc., Vol. 23, page 987, we find the rule laid down: "The federal courts are prohibited by statute from granting injunctions to stay proceedings in the state courts, and this prevents them from enjoining the enforcement of judg-

ments recovered in state courts. *But a federal court, having otherwise jurisdiction of the action, may make a decree, which as between the parties, shall set aside and vacate a judgment of a state court, and the proceedings taken and rights acquired thereunder, on the ground that it was procured by fraud, or was void for want of jurisdiction.*"

This language is fully borne out by the authorities cited by us in support of it. Among them is the case of *Howard vs. De Cordova*, 177 U. S. 609. In this case the deceased father of complainants was entitled to a certain share in defendants' land in compensation for professional services rendered. In order to defraud him and his heirs out of this interest, defendant brought a partition suit against the co-owners, including plaintiffs, as unknown heirs of J. W. Zacharie, the man whom they had so employed. On false affidavits, alleging the residence of complainants to be unknown, and other frauds, they procured an order of publication of summons, which was published in an obscure paper. A decree of partition was had in the state court, and complainants now bring their bill in the federal court to set aside said decree of partition and sale thereunder, on the ground that the court rendering it, had no jurisdiction, and because said decree of partition and order of sale were obtained by fraud.

To this bill defendants filed a demurrer, which assigns for reasons almost the identical grounds alleged in defendants' motion to dismiss in the present case:

“ First. It appeared from the face of plaintiffs’ amended bill that the bill seeks to set aside, cancel and annul the judgment of the District Court of Freestone County, State of Texas, and this court has no jurisdiction or power to cancel, set aside or annul the judgment of the state court, said court having jurisdiction both over the subject-matter and of the persons in said suit, said suit being a partition suit and the proceeding one in rem.

“ Second. The amended bill shows upon its face that the object of the bill is to obtain a new trial in this court in cause number 1960, tried and determined in the District Court of Freestone County, Texas, as shown by the exhibits to the bill, under and in accordance with article 1375 of the Revised Statutes of Texas, that this proceeding is but a continuation of said suit, and this court has no jurisdiction of the same, but the District Court of Freestone County, Texas, alone has jurisdiction of the same.

“ Third. And that the judgment of the District Court of Freestone County, Texas, is valid and binding upon all the parties to this suit, and this court has no jurisdiction, power or authority to review or to cancel and annul the same for the pretended fraud, as set out in plaintiffs’ bill, or for any other cause therein stated.

“ After hearing, the Court sustained the demurrer and dismissed the suit ‘for want of jurisdiction of the subject-matter in controversy,’ and the correctness of its action in so doing is the question which arises on this appeal.

“ Mr. Justice White, after making the foregoing statement, delivered the opinion of the court. ‘That the court erred in sustaining the demurrer and dismissing the suit for want of jurisdiction of the subject-matter of the controversy, has been in effect conclusively settled by this court in a case decided since the action of the court below was

taken. *Cooper vs. Newell*, 173 U. S. 555. In that case suit had been brought in a court of the State of Texas in the ordinary form of trespass, to try title by Peter McGrael against Stewart Newell, the defendant. It was alleged in the suit that the plaintiff was a resident of Texas, and that the defendant was also a resident and citizen of that State. An answer was filed in the cause by an attorney-at-law in the name of the defendant, and the suit proceeded to judgment. The controversy decided in *Cooper vs. Newell* thus arose: Newell filed his bill in the Circuit Court of the United States in and for the Eastern District of Texas, in the ordinary form of trespass; to try title to recover the land to which the suit of McGrael vs. Newell had related. He charged that the defendants claimed title under the judgment rendered in that suit, but that they had no title because he, Newell, had never resided in the State of Texas; had not authorized any attorney to appear for him in the suit, and that, therefore, the proceedings in McGrael vs. Newell were as to him *res inter alios acta*, and wholly void. The controversy turned on whether Newell could be heard in the Circuit Court of the United States to attack the judgment of the state court, it being contended that the fact that Newell was represented by an attorney at law, who appeared and filed an answer in his name, was conclusively established by the judgment, which could not be assailed collaterally in a court of the United States, however much it might be subject to direct attack for fraud in the courts of the state of Texas. The contention was not maintained, it being decided that if the charges went to the jurisdiction of the state court such question of jurisdiction could be examined in the courts of the United States whenever the judgment of the state court was presented as a muniment of title. The alleged facts in the case before us bring it directly within this ruling. By chapter 95, sections 13 and 14, Laws of Texas, 1847 and 1848, page 129, the affidavit by the plaintiff or his at-

torney as to the want of knowledge of the names of the parties defendant or their residences, is made an essential prerequisite of the jurisdiction of the court to issue an order for publication. In other words, a summons by publication can only take place when the essential affidavit is previously made. In the state court the affidavit was therefore jurisdictional in its character; and its verity was directly assailed by the averments of the present bill which were admitted by the demurrer. Besides this decisive consideration, the proceedings in the state court, whatever may have been their efficacy as a defense to the charges of fraud contained in the bill, as to which we express no opinion were not adequate to defeat the jurisdiction of the Circuit Court of the United States. In other words, they address themselves not to the jurisdiction of the court, but to the courts of the case. *Huntington v. Laidley*, 176 U. S. 668."

To the same effect is the case of *Northern Pacific Railroad Company vs. Kurtzman*, 82 Fed. 241, which was a suit to set aside a judgment of the state court for delinquent taxes, and a sale had thereunder. The Court, speaking of the jurisdiction of the Federal Courts over such suits, says as follows:

"In the argument, counsel for the defendant treated the case as one in which the primary object is to enjoin proceedings to enforce a decree rendered by the Superior Court of the State in and for Franklin County. I recognize the absolute correctness of the proposition that the Federal Courts are forbidden by express provisions in the laws enacted by Congress to issue injunctions to stay proceedings in any court of a state, but that principle is not applicable where the suit in the Federal Court is a direct attack upon a judgment rendered in a state court for the purpose of nullifying such

judgment, upon the ground that the same was obtained by fraud, or because the court in which such judgment appears of record had no jurisdiction to render the same. In the exercise of their general equity powers, the Circuit Courts of the United States have always been free to grant relief of this nature in cases coming within their jurisdiction. *Galpin v. Page*, 18 Wall. 351-375; *Pennoyer vs. Neff*, 95 U. S. 714-748; *Arrowsmith vs. Gleason*, 129 U. S. 86-101, 9 Sup. Ct. 237; *Marshall vs. Holmes*, 141 U. S. 589-601, 12 Sup. Ct. 62. The bill of complaint attacks the judgment of the Superior Court on the ground that it acted without jurisdiction in rendering the judgments. The statute under which the court assumed to act prescribes the time and manner of giving notice of the proceedings. In all special statutory proceedings substantial compliance with the terms of the statute as to the notice is essential to jurisdiction, unless waived, and in this particular the averments of the bill are sufficient to show *prima facie* that the Superior Court did not have jurisdiction, for it specifically alleges noncompliance in particulars which are material, so that, taking the bill to be true, the judgments are void; therefore the bill is sufficient, as tested by a general demurrer. In the case of *De Forest vs. Thompson*, 40 Fed. 375-381, the defendants disputed the jurisdiction of the United States Circuit Court for the District of West Virginia on the ground that the sale of the land for nonpayment of taxes under the decree of a state court could not be brought into question except in the state court which rendered the decree for sale of the lands, and that the courts of the United States were without jurisdiction to pass upon the validity of the title to lands acquired by purchase at a sale pursuant to a decree of a state court. In the opinion of the Court by Judge Jackson, and concurred in by Mr. Justice Harlan, the objection was overruled. The learned judge states the question of the ruling as follows:

“The question to be determined herein is whether the orders of the Boone Circuit Court under which the lands in dispute were sold, are conclusive and binding upon the plaintiffs, when assailed in an independent collateral proceeding, and may be decided as well here as in a state court. The presence of such a question in the case does not affect the jurisdiction of this court, for it is competent for the Federal Court, in a controversy between citizens of different states, to pass upon the question whether the state courts had jurisdiction or power to order the lands in question sold by the school commissioner. *Payne vs. Hood*, 7 Wall. 425, *Johnson vs. Waters*, 111 U. S. 640, 4 Sup. Ct. 619, *Arrowsmith vs. Gleason*, 129 U. S. 86, 9 Sup. Ct. 237. In the last case referred to, the court said “These principles control the present case, which, although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief by the parties; such relief being grounded upon a new state of facts, disclosing not only imposition upon a court of justice, in procuring from it authority to sell an infant’s lands, when there was no necessity therefor, but actual fraud in the exercise from time to time, of the authority so obtained. As this case is within the equity jurisdiction of the Circuit Court, as defined by the constitution and laws of the United States, that court may, by its decree, lay hold of the parties, and compel them to do what, according to the principles of equity, they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion.”

“From what appears in the complaint, the complainant has ample grounds for maintaining a suit in equity, and this court has jurisdiction of the subject-matter of the controversy and of the parties.”

A very illustrative case reviewing the decisions at large, is the case of *Davidson vs. Moore*, 74 Fed. 945, which follows the same rule. The reports abound with authorities to the same effect, and we consider it useless to multiply them. They all settle beyond a question of a doubt that when a judgment recovered in a state court is offered as a cause of action or defense in a Federal Court, the latter court may inquire into the jurisdiction of the former, and the effect of the judgment will be avoided if it is shown that the court rendering it lacked jurisdiction of the subject-matter or of the parties.

This we deem sufficient to prove our contentions that a Federal Court of Equity has power to afford us relief in the premises against the void decrees. But there is another reason why this motion to dismiss should be overruled.

As a further ground for relief it is expressly alleged in our complaint (Sec. XIII), "that at the day and hour of sale (of said property) one certain L. G. Bradley attended and wrongfully, fraudulently and wickedly, and without any authority or right or direction whatsoever from this plaintiff, represented himself to be the agent and representative of this plaintiff, and then and there wrongfully, unlawfully and fraudulently pretended to have authority from this plaintiff to bid on his behalf at said public sale."

The case of *Cooper vs. Newell*, 173 U. S. 555, above referred to, presents a very similar state of facts. Swett, an attorney, appeared for a man named Newell in a suit brought against the latter involving valuable inter-

ests in lands, though having no authority whatsoever so to do. A decree against Newell was entered in due time, and under it the property was sold. Newell, after the sale, upon becoming aware of this fraud, brought a bill in the Federal Court to set aside said judgment and sale. The U. S. Supreme Court held that this fraud vitiated the judgment and sale and that the federal courts had the power to set the judgment and sale aside. The Court, speaking through Chief Justice Fuller, *inter alia*, said:

“ In *Thompson v. Whitman*, 18 Wall. 457, a leading case in this court, it was ruled that ‘neither the constitutional provision that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of each other state, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered’; that ‘the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist’; and that ‘want of jurisdiction may be shown either as to the subject-matter or the person, or, in proceedings in rem, as to the thing.’ But while these propositions are conceded, it is insisted that the Circuit Court of the United States for the Eastern District of Texas was bound to treat this judgment rendered by one of the courts of the State of Texas as if it were strictly a domestic judgment drawn in question in one of those courts, and to hold that it therefore could not be assailed collaterally.

“ We are of opinion that this contention cannot be sustained, and that the courts of the United States sitting in Texas are no more shut out from

examining into jurisdiction than if sitting elsewhere, or than the courts of another state. A domestic judgment is the judgment of a domestic court, and a domestic court is a court of a particular country or sovereignty. Undoubtedly the judgments of courts of the United States are domestic judgments of the Nation, while in the particular State in which rendered they are entitled to be regarded as on the same plane in many senses as judgments of the state; and so the judgments of the courts of the several states are not to be treated by each other or by the courts of the United States as in every sense foreign judgments. But the courts of the United States are tribunals of a different sovereignty, and exercise a distinct and independent jurisdiction from that exercised by the state courts, and this is true in respect of the courts of the several states as between each other. And the courts of the United States are bound to give to the judgments of the state courts the same faith and credit that the courts of one state are bound to give to the judgments of the courts of her sister states."

The complaint herein (paragraph 13) alleges that one L. J. Bradley attended said sale and pretended to represent this plaintiff when he lacked authority so to do; that O. E. Cannon, Receiver, Harry Watkins and James H. Brady, conspired with each other to stifle competition, to keep prospective bidders away, and to otherwise defraud this plaintiff, and that they put their said conspiracy into execution. This is a matter arising after the rendering of the various void judgments by the state courts, and was pleaded specifically, in order to give the complaint or bill a double aspect. In other words, the complaint states facts on which this court can either vacate or enjoin the various judgments and decrees of the state courts of Idaho, and which al-

leges also sufficient facts to entitle us to have the sale of the property set aside on the grounds of fraud and collusion by defendants' predecessors in interest, gross inadequacy of price and stifling of competitive bidding at said sale. A complaint very much the same will be found in the case of *Dormitzer et al. v. German Savings and Loan Soc. et al.*, 62 Pac. 862.

“ The prayer of a complaint asked that a guardian's release of certain mortgages on property belonging to a ward should be cancelled, and the mortgage foreclosed, and for general relief. The allegations of the complaint attacked the probate proceedings and acts of the guardian, and a sale of the property made by him as fraudulent, which was denied by the defendant. The defendant contended that, as the suit was for the foreclosure of the mortgage, the validity of the probate proceedings and the acts of the court could not be questioned, as it would be a collateral attack thereon. Held, that the sale and deeds of the guardian could be cancelled in such proceedings, since the complaint was drawn with a double aspect, and was not such an adoption of the remedy of foreclosure as would constitute a waiver of the right to object to the fraudulent proceedings and make the attack thereon collateral.”

It is a rule of universal application that where fraud has been practiced at a judicial sale, it will be set aside even after the confirmation thereof by the court. A court will not lend its aid to deprive parties interested in a suit of their property by the fraudulent or unconscionable acts of others.

It is likewise alleged in the complaint that although the property was fully worth \$500,000.00, through the

fraud practiced at the sale in keeping away prospective bidders, and through other designs and schemes, it was struck off to Watkins for \$56,546.79, or for about 10 per cent of its then real value. Although inadequacy of price is not generally sufficient ground for setting aside a judicial sale, yet if it raises a presumption of fraud or shocks the conscience of the court, or if there are other circumstances connected therewith, showing apparent unfairness, the court may vacate the sale.

That being so, the next question is, has a Federal Court the power to set aside a judicial sale ordered by a state court?

The case of *Arrowsmith vs. Gleason*, 129 U. S. 86, dispells all doubt on this point:

“ This suit involves the title to certain lands inherited by the plaintiff, and sold some years ago by his statutory guardian, the defendant Gleason, under authority conferred by proceedings instituted by him in the Probate Court of Defiance County, in the State of Ohio. The plaintiff attacks the order of sale as invalid, prays that the deeds executed to the purchaser be declared void, that an accounting in respect to rents and profits be had, and that such other relief be granted as may be proper. The court below sustained demurrers to the bill, and dismissed the suit. We are, therefore, to inquire, upon this appeal, whether the bill discloses a cause of action entitling the appellant to relief in a court of equity.”

The plaintiff after alleging in his complaint the sale by his guardian of certain lands “also alleges that notwithstanding there was no necessity for any further sale

or sacrifice of his estate of inheritance, Gleason, on the 4th day of December, 1874, although having in his hands unexpended, large sums derived from the sale of the above premises, as well as considerable sums received from the release of tax titles, all of which was known to Harmening, and without any new appraisement of the plaintiff's lands (though they had risen greatly in value), and without giving an additional bond or obtaining a new order of sale ("for the purpose of getting money into his hands for his own private gain, without reference to the true interest of your orator in the premises, and willing that the said Harmening should get the lands bought at a low and underprice, connived and colluded with him, the said Harmening, to sell the lands hereinafter described in violation of his duties and the trust imposed on him, claiming to act on the said order of sale long since entered in said court, sold, December 4, 1874, to Harmening, the following described lands, situated in Defiance County, aforesaid, viz.: The north half of Section thirty-six, in township four, north of range three east, and the west half of the same section in the same township and range, containing together four hundred acres, for the sum of \$6,000.00, and reported the sale to the said court on the same day, and the same was, without proper examination, or opportunity for the friends of the said ward, your orator, or his relatives, to examine the same and advise the said court or the said Gleason in the premises, improperly—illegally confirmed the said sale, and ordered the said guardian to make, execute, and deliver a deed for the same to the said Harmening on his compliance with the terms of

sale, and further ordered the said guardian to pay out of the proceeds of said sale the sum of \$1,500.00 as and for the dower interest therein held by the said Mary Arrowsmith”).

“ The bill further charges that the order authorizing said sales to be made as well as the orders confirming them were illegal; that the sales made by Gleason were in violation of his trust and in fraud of his rights, ‘as the said Harmening and the said Gleason well knew’; that he has never received from said Gleason or from any source, to his knowledge, any of the proceeds of such sales, nor to his knowledge, belief, or information, have any part thereof been applied for his benefit; and that the deeds, placed upon record by Harmening, so cloud his title to said lands that he cannot sell them or otherwise enjoy the beneficial use of them.’ ”

By way of comparison it may be well to remark here, that Gleason, the guardian, and John Frederick Harmening, the fraudulent purchaser at such guardian’s sale, correspond in our case to Cannon, the receiver, and to Harry Watkins, the straw man of James H. Brady, the fraudulent purchaser.

The Court, speaking through Mr. Justice Harlan, among other things said:

“ But is the appellant without remedy for the wrong alleged to have been done him? We think not. If all the substantial averments of his bill are true—and, upon demurrer, they must be so regarded—he makes a case of actual fraud, upon the part of his guardian, in which Harmening to some extent participated, or of which, at the time,

he either had knowledge or such notice as put him upon inquiry. According to these averments, there was no necessity whatever for these sales, at least for the sale of the east half of the southwest quarter of section 36, township four north, range three east, in Defiance County, containing eighty acres, or of the smaller tract in Paulding County, or of the four hundred acres in Defiance County that were sold in December, 1874. It is alleged, and by the demurrer it is admitted, that when the last sale was made, Gleason had in his hands, unexpended, as Harmening well knew, large sums derived from the previous sales, as well as considerable amounts received from releases of tax titles on land held by appellant; and yet, by collusion with Harmening, and in order that the latter might get the lands for less than their value, he made the sale of the four hundred acres.

“ But it is insisted that the Circuit Court of the United States, sitting in Ohio, is without jurisdiction to make such a decree as is specifically prayed for, namely, a decree setting aside and vacating the orders of the Probate Court of Defiance County. If by this is meant only that the Circuit Court cannot by its orders act directly upon the Probate Court, or that the Circuit Court cannot compel or require the Probate Court to set aside or vacate its own orders, the position of the defendants could not be disputed. But it does not follow that the right of Harmening, in his lifetime, or of his heirs since his death, to hold these lands, as against the plaintiff, cannot be questioned in a court of general equitable jurisdiction upon the ground of fraud. If the case made by the bill is clearly established by proof, it may be assumed that some state court, of superior jurisdiction and equity powers, and having before it all the parties interested, might afford the plaintiff relief of a substantial character. But whether that be so or not, it is difficult to perceive why the Circuit Court is not bound to give relief according to the recognized rules of equity, as ad-

ministered in the courts of the United States, the plaintiff being a citizen of Nevada, the defendants citizens of Ohio, and the value of the matter in dispute, exclusive of interest and costs, being in excess of the amount required for the original jurisdiction of such courts. * * * * *

“While there are general expressions in some cases apparently asserting a contrary doctrine, the later decisions of this court show that the proper Circuit Court of the United States may, without controlling, supervising, or annulling the proceedings of state courts, give relief, in a case like the one before us, as is consistent with the principles of equity. As said in *Barrow vs. Hunton*, 99 U. S. 80-85, the character of the case “is always open to examination, for the purpose of determining whether, *ratione materiae*, the courts of the United States are incompetent to take jurisdiction thereof. State rules on the subject cannot deprive them of it.”

“This whole subject was fully considered in *Johnson vs. Waters*, 111 U. S. 640-667. That was an original suit in the Circuit Court of the United States for the District of Louisiana. It was brought by a citizen of Kentucky against citizens of Louisiana. Its main object was to set aside as fraudulent and void certain sales made by a testamentary executor under the orders of a Probate Court, which was alleged to have exclusive jurisdiction of the subject-matter, and that its decision was conclusive against the world, especially against the plaintiff, a party to the proceedings. This court, while conceding that the administration of the state in question properly belonged to the Probate Court, and that, in a general sense, the decisions of that court were conclusive and binding, especially upon parties, said ‘but this is not universally true. The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop

a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of fraud. The Court of Chancery is always open to hear complaints against it, whether committed in pais or not or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceedings in another court; but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it—citing Story's Eq. Jur. Sections 1570-1573; Kerr on Fraud and Mistake 352-353; Gaines vs. Fuentes, 92 U. S. 10; and Barrow vs. Hunton, 99 U. S. 80.

“So, in *Reigal vs. Wood*, 1 Johns. Ch. 402, 406; ‘relief to be obtained not only against writings, deeds, and the most solemn assurances, but against judgments and decrees, if obtained by fraud and imposition.’ To the same effect is *Bowen vs. Evans*, 2 Hl. cas. 257-281; ‘If a case of fraud be established, equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivances by which it may have been attempted to protect them. It is immaterial, therefore, whether such machinery and contrivances consisted of a decree of equity, and a purchase under it, or a judgment at law, or of another transaction between the actors in the fraud.’ See also *Colclough vs. Bolger*, 4 Dow. 54-64, *Barnesly vs. Powel*, 1 Ves. Sen. 120, 284, 289; *Richmond vs. Tayleur*, 1 P. Wms. 734, 736; *Niles vs. Anderson*, 5 How. (Miss.) 365, 386.

“These principles control the present case, which, although involving rights arising under judicial proceedings in another jurisdiction, is an original, independent suit for equitable relief between the parties; such relief being grounded upon a new state of facts, disclosing not only imposition upon a court

of justice in procuring from it authority to sell an infant's lands when there was no necessity therefor, but actual fraud in the exercise, from time to time, of the authority so obtained. As this case is within the equity jurisdiction of the Circuit Court, as defined by the Constitution and laws of the United States, that court may, by its decree, lay hold of the parties, and compel them to do what according to the principles of equity they ought to do, thereby securing and establishing the rights of which the plaintiff is alleged to have been deprived by fraud and collusion."

POINT XII.

We now come to the point that seemed to give the lower court great difficulty, and on which the lower court sustained defendants' motion to dismiss, namely, the Statute of Limitations.

Under Section 4213 of the Idaho Code, it is expressly provided that the Statute of Limitations must be taken advantage of by plea, and in the case of *Kelly vs. Leachman*, 3 Idaho 629 (33 Pac. 44) it was held that a general demurrer was not sufficient to raise this defense. The case of *Chemung Mining Company vs. Hanley*, 9 Idaho 787, after holding to the same effect, went one step farther and laid down the rule that the defense could be taken advantage of either by answer or by special demurrer, provided that the facts constituting the defense appear on the face of the complaint. In the latter case the plaintiff pleaded in his complaint that he entered into a contract with defendant "*on or about*" a certain date, and the court held that a judgment on the pleadings

could not be sustained thereon as it did not appear on the face of the complaint that the statute had actually run, and that, consequently, plaintiff was entitled to have proof submitted that the statute had or had not run, and the judgment of the trial court was reversed. Even admitting for the sake of argument that a motion to dismiss under the new Federal Equity Rules is equivalent to a special and not to a general demurrer, yet, notwithstanding this, nothing appears on the face of the complaint showing when plaintiff became aware of the fraud practiced upon him on said sale, and the defendant not having assigned this uncertainty either as a ground of demurrer, or by a motion to make more definite and certain, has waived this ground (*Chemung Mining Company vs. Hanley*, *supra*) and the defendant is now obliged to plead it by answer.

The complaint, as heretofore remarked, was purposely drawn with a double aspect, and if we state a cause of action against these defendants either on the ground of fraud, or on the ground that the various judgments of the state court are void for want of jurisdiction, defendants' motion to dismiss must be overruled. Defendants could have forced us to separately state these two causes of action, but having failed to do so, they have waived this ground of attack, and by their motion to dismiss admit the facts as pleaded.

Addressing ourselves first to that part of the Statute of Limitations of Idaho applicable to our cause of action sounding in tort, we find that section 4054, subdivision 4 of the Idaho Code provides expressly that the

cause of action in case of fraud or mistake shall not be deemed to have accrued *until the discovery by the aggrieved party of the facts constituting the fraud or mistake*. The complaint does not show on its face when we acquired this knowledge, and it therefore devolves now upon defendants, if they contend that we had knowledge of said fraud for a period longer than prescribed by the Statute of Limitations, to call this condition of affairs to the Court's attention by plea. We then have the right to join issue on this point, and have the Court decide whether or not our cause of action is barred. Paragraph XIII of the complaint alleges that said sale took place on the 5th day of January, 1912, and that at said sale fraud and collusion was practiced. It therefore follows that notice of such fraud and collusion must have come to plaintiff's knowledge after January 5th, 1912, and adding thereto the three years allowed by the Statute of Limitations, it follows that plaintiff had until the 5th day of January, 1915, in which to file his complaint on the ground of fraud practiced at said sale. Plaintiff's complaint herein was filed on the 30th day of April, 1914, and he is therefore within the Statute of Limitations on that point.

Addressing ourselves now as to the cause of action sounding in contract, we are confronted with the question as to whether Section 4051 of the Idaho Code applies, which provides that an action upon a judgment or decree of any court of the United States, or any state or territory within the United States, must be brought within 6 years, or whether Section 4052 which allows five years for the institution of any action upon any contract,

obligation or liability founded upon an instrument in writing is applicable. However, we shall show that even if Section 4052 is applicable, plaintiff is within the Statute of Limitations, the various appeals to the Supreme Court of the State of Idaho having tolled said section of the Statute.

The Legislature of the State of Idaho evidently intended to differentiate between causes of action arising on instruments in writing and causes of action arising out of judgments or decrees.

If plaintiff's mortgage had been validly foreclosed, there would be no necessity of trying to foreclose it again. It is this void judgment of the District Court of Idaho attempting to foreclose plaintiff's mortgage, and allowing these receivership certificates to be prior incumbrances, that gives birth to the necessity of the within suit. Is, therefore, the within suit a cause of action based upon plaintiff's mortgage, or is it not a cause of action arising in plaintiff's favor by virtue of said judgment of the District Court, which, as we claim, is depriving him of his property without due or any process of law? It appears to us as perfectly plain that it is this judgment, and not the mortgage which is the proper basis of plaintiff's suit.

From paragraph IX of the complaint it appears that the judgment of the District Court attempting to foreclose said mortgage, was rendered on the 21st day of July, 1910, and if Section 4051, relating to suits and actions upon judgments and decrees is applicable, then plaintiff had until the 21st day of July, 1916, in which to bring the within suit, and having filed his complaint

long before that, the Statute of Limitations has not run against him.

Reading between the lines of the order of the lower court dismissing plaintiff's complaint, the language of the court seems to indicate that the court was inclined to overrule defendant's motion to dismiss, but failed to do so, because as the court said, it appeared to it as useless on account of the running of the Statute of Limitations on the mortgage. In other words, the Court reasoned that even if these various judgments are set aside as being void, his cause of action arising on said mortgage not having been foreclosed within five years is now barred by section 4052. The Statute of Limitations does not mean that a valid judgment must be recovered within the time allowed by statute, but merely that an *action must be instituted within the statutory time*.

Plaintiff's cause of action on the mortgage did not accrue until the 30th day of July, 1908. Adding thereto the five years allowed by the statute, plaintiff would have had until the 30th day of July, 1913, in which to bring a suit for foreclosure of his said mortgage. The decree in the foreclosure suit was rendered on the 21st day of July, 1910; an appeal therefrom was taken to the Supreme Court of Idaho, and a judgment by the Supreme Court affirming said decree was not entered until the 26th day of September, 1911; fourteen months, speaking in round figures, having elapsed in the interim. The time consumed by an appeal, as we shall hereinafter show more fully, is always to be deducted from the Statute of Limitations, the operation of the statute being

tolled during that time. Adding these fourteen months which were consumed during the appeal from the foreclosure decree to the Supreme Court, to the 30th day of July, 1913, it follows that plaintiff had until the 30th day of September, 1914, in which to bring another suit for the foreclosure of his mortgage. From this time must further be deducted the time consumed by the writ of prohibition sued out by plaintiff to the Supreme Court of Idaho, for it is expressly provided by section 4074 of the Idaho Code that when the commencement of a suit is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not a part of the time limited for the commencement of the action. In paragraph XI of the complaint the date of the judgment of the Supreme Court of Idaho affirming the decree in the foreclosure suit is alleged to be the 26th day of September, 1911. In paragraph XXII of the complaint it is alleged that the writ of prohibition did not come on for hearing until the 19th day of December, 1911, three months again elapsing in the meantime. Adding these three months to the 30th day of September, 1914, we arrive at the 30th day of December, 1914, which constituted the last day on which plaintiff could bring a second suit for foreclosure of his mortgage, or long after plaintiff had instituted the within suit.

Our contention has been at all times, and now is, that the decree of the court foreclosing plaintiff's mortgage is null and void on account of going beyond the issues as framed by the pleadings. Although this decree was void, it was, as we have heretofore shown, of a sufficient effect to support an appeal therefrom to the Supreme Court of

Idaho. Consequently, at the time of the rendering of said judgment, plaintiff had two remedies. He could either have appealed from this void judgment and attempted to secure a reversal thereof by the Supreme Court, or he could have treated it as a nullity and attacked it by a direct suit. His time for effecting and prosecuting an appeal to the Supreme Court was limited to a much smaller space of time than his cause of action to attack this judgment in a direct suit. Consequently, plaintiff pursued the way of safety by first prosecuting an appeal to the Supreme Court, and then, having failed in this, instituted the within suit to attack the decree on the ground of want of jurisdiction and fraud practiced at said sale. The fraud practiced at said sale had not occurred at the time plaintiff prosecuted his appeal to the supreme court from the foreclosure decree, and consequently he could by no possibility have raised this matter on appeal. Neither could he have done so, even if the fraud had then existed, for the reason that it is a matter *dehors* the record, which he could not have urged upon such appeal.

Having proven that a void judgment will support an appeal, the last question is, was the Statute of Limitations tolled during the pendency of said appeal? On account of the importance of this point, we desire to quote at length the rule as laid down in volume 19 of *Am. & Eng. Enc. of Law*, Sec. Edition, on page 212, which language is borne out by the cases of *Brown vs. Sauerwein*, 10 Wall. U. S. 223, *Amy vs. Watertown*, 130 U. S. 320, *Hopkirk vs. Bell*, 3 Cranch, U. S. 454. "The courts cannot create exceptions in favor of any class of persons or cases, or in favor of particular cases, when

the statute itself makes none, and no hardship which might result from adherence to this rule can justify a court in departing from it and reading into the statute some qualification which the legislature did not provide." Then continuing on page 215, it is said: "Exceptions to Rule. Exceptions by Necessity Generally—Notwithstanding the rule previously stated that the courts cannot create exceptions to the statute, a limited class of exceptions, not provided by the statute, but arising out of necessity, have been generally recognized and enforced. (Citing *Brown vs. Sauerwein*, *Amy vs. Watertown*, and *Hopkirk vs. Bell*.) These exceptions are based on the assumption that the statute, although one of repose, was not intended to bar a plaintiff's remedy because it was not exercised within the stated time, *where such a state of affairs existed as rendered it impossible for him to begin his action within that time.*" *U. S. vs. Wiley*, 11 Wall. U. S. 513.

"(b) Prohibition to sue by paramount authority. General rule—Wherever the plaintiff is prohibited from exercising his legal remedy by some paramount power, as by process of the courts, or by direct or indirect legislation, or by a mere condition of affairs, which precludes his bringing his suit, the time during which he is thus prevented shall not be counted against him in determining whether the statute of limitations has barred his action, even though the statute makes no specific exception in his favor in such cases.

"By other legal proceedings—The same rule applies where the plaintiff is prevented from beginning suit by

the pendency of any other legal proceeding, which operates as an injunction, e. g. the appointment of a receiver to wind up an insolvent corporation, or the filing of a general creditor's bill for the same purpose, *or by an appeal, or similar proceeding which operates ex proprio vigore to prevent the institution of an action or suit.*"

And now just a word as to our contention that Mr. Hewitt's property right in said mortgage was taken from him without due process of law in contravention of the 14th Amendment to the Constitution of the United States. No phrase in the law has been more defined and in as many different ways as the words "due process of law" and there are countless decisions on this question. At this time we refer in the briefest manner to 8 CYC 1083; "The constitutional provision that no person shall be deprived of his life, liberty or property without due process of law extend to every governmental proceeding, whether the proceeding by legislative, judicial, administrative or executive. The term due process of law, when applied to judicial proceedings, means that there must be a competent tribunal to pass on the subject and produce evidence; and if the subject matter involves the personal liability of defendant he must be brought within the jurisdiction of the Court by service of process within the state or by his voluntary appearance."

The terms "law of the land" and "due process of law" are legal equivalents.

Daniel Webster in the Dartmouth College Case, 4 Wheat (U. S.) defined law of the land, saying by it is

meant a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial.

“The due process of law required by the Constitution means that notice or summons by which a party is tendered his day in Court with the right to frame an issue and be heard before judgment can be rendered or execution issued which shall take away his liberty or property.”

104 Mich. 254.

Based upon the foregoing argument and authorities, we respectfully submit that the order and decree of the lower Court, sustaining defendant's motion to dismiss, and dismissing plaintiff and appellant's complaint be reversed.

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United States
Circuit Court of Appeals
For the Ninth Circuit

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VS.

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Brief of Defendant in Error, Mountain
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*Upon Appeal from the United States District Court
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**BRIEF OF THE ARGUMENT WITH POINTS AND
AUTHORITIES.**

I.

The essential elements in suits of equity to vacate judgments of state courts are: 1. Federal jurisdic-

tion; 2. An equitable ground, as fraud; 3. No adequate remedy at law; 4. Meritorious defense; 5. Laches; 6. Statute of limitations.

II.

The complaint shows two attacks against proceedings in state court, as follows:

1. Against Finding 149, Conclusion 35 and Decree.
2. Against the Receiver's sale.

III.

The ground of attack against the finding, conclusion and decree is as follows:

1. Want or excess of jurisdiction.

Defendant in error contends this question, first, is *res adjudicata*; second, that equity will not grant relief when want or excess of jurisdiction appears on face of record, and third, the alleged error is judicial and therefore erroneous only.

The grounds of attack against the Receiver's sale are as follows:

1. That it was had in compliance with a void decree.
2. Fraud.

Defendant in error contends that the decree is valid and the question of its validity is *res adjudicata* and that the fraud is not sufficiently alleged, that part of the fraudulent charges are *res adjudicata*, that said Hewitt filed objections to the confirmation of the sale, had his day in court and should have assigned all grounds including that of fraud,

and that the complaint shows he is guilty of laches in raising the question of fraud.

IV.

The complaint shows that Hewitt had his day in court, in the state court, attacking the validity of the foreclosure decree upon the same grounds, three times, as follows:

1. By an appeal from the foreclosure decree.
2. By writ of prohibition.
3. By objections to and appeal from order confirming sale.

This court can examine the decisions of the Supreme Court, which are referred to by volume and page in the complaint, to aid in determining whether the same questions now raised were raised and passed upon by the state courts.

Allen v. Allen, 97 Fed. 525.

V.

Res Adjudicata. The decisions of the state courts on the same grounds make such matters res adjudicata.

U. S. v. Anderson, 169 Fed. 205.

Forsyth v. Hammond, 166 U. S. 517.

VI.

Adequate Remedy at Law. Hewitt pursued adequate remedies at law and still had another by appeal to the Supreme Court of the United States, which he neglected to pursue and therefore a court of equity will not assist him.

I Black on Judgments § 361.

I Black on Judgments § 363.

VII.

Due Process of Law. The allegations in the complaint, as to the decree not being warranted by the pleadings and proof, and that decree is void for excess of jurisdiction, are insufficient for a court of equity to set aside the decree as taking of property without due process of law.

Allen v. Allen, 97 Fed. 525.

U. P. R. Co. v. Flynn, 180 Fed. 565.

23 Cyc. 1004.

VIII.

Must Abide by Forum Selected. Appellant selected his tribunals and fully presented same matters, so a federal court cannot now take jurisdiction.

Bailey v. Willeford, 126 Fed. 803.

IX.

If the invalidity of the judgment or want of jurisdiction of the state court appears upon the face of the record, equity will not grant relief.

Blythe v. Hinckley, 84 Fed. 246; 173 U. S. 499.

L. R. J. Ry. v. Burke, 66 Fed. 83.

U. P. R. Co. v. Flynn, 180 Fed. 569.

N. S. L. Co. v. Johnson, 196 Fed. 58.

Robb v. Vos, 39 L. ed. 52-61.

Kaufman v. Drexel, 76 N. W. 559.

Nat. Sur. Co. etc. v. State B. etc., 120 Fed. 593.

U. S. v. Andersen, 169 Fed. 201.

I Black on Judgments § 297a, § 358.

I Joyce on Injunctions § 556.

11 Enc. Pl. & Pr. 1201.

McNeil v. McNeil, 78 Fed. 834.

X.

The error complained of, that the pleadings and proofs do not warrant the foreclosure decree in declaring the receiver's certificates prior to the Hewitt mortgage, is judicial and makes the decree erroneous only.

I Black on Judgments § 367-§ 271.

Preston v. Kindricks, 27 S. E. 588.

Petelka v. Fitle, 51 N. W. 131.

I Black on Judgments § 138.

Henderson v. Moore, 34 S. E. 446.

Allen v. Allen, 97 Fed. 525.

Ewing v. St. Louis, 5 Wall 413.

XI.

Charges of fraud not sufficient to sustain bill for following reasons:

1. That allegations of acts constituting fraud are insufficient.

2. That part of fraud is *res adjudicata*.

3. That the fraud should have been assigned as a ground when objections were filed to confirmation of sale.

4. That said Hewitt is guilty of laches in raising fraud.

5. That there are no allegations excusing laches.

6. That time of discovery of fraud is not alleged.

XII.

The complaint must set forth the facts constituting the fraud.

I Black on Judgments § 393.

I Black on Judgments § 369.

XIII.

Hewitt filed objections to confirmation of sale but failed to include the ground of fraud. A party must assign all the grounds he may have for the relief sought, and those not raised will be deemed waived.

14 Ency. Pl. & Pr., 119, citing many cases.

XIV.

If laches appear upon face of bill it is subject to demurrer or motion to dismiss.

6 Ency. Pl. & Pr., 405.

12 Ency. Pl. & Pr., 829-31.

I Black on Judgments § 393.

Spespy v. Comer, 76 Ala., 501.

Graham v. B. etc. R. Co., 118 U. S. 161.

XV.

Complaint must set forth facts, not conclusions, excusing laches.

I Black on Judgments, Sec. 393.

23 Cyc. 1042, 1011.

12 Enc. Pl. & Pr. 835-6-7-8.

P. etc. Ry. Co. v. K. & H. B. Co., 107 Fed. 786.

Christy v. A. etc. Co., 214 Fed. 1016.

XVI.

Must allege time of discovery of fraud.

Lataillade v. Orena, 91 Cal. 566.

Truett v. Onderdonk, 120 Cal. 581.

Robertson v. Burrell, 110 Cal. 568.

L. S. C. Co. vs. Wood, 113 Cal. 482.

Eldred v. White, 102 Cal. 600.

P. etc. Co. v. K. & H. B. Co., 107 Fed. 782.

Hendryx v. Perkins, 114 Fed. 801-811.
Hardt v. Haidmeyer, 152 U. S. 546.
Stearns v. Page, I Story 204.
Stearns v. Page, 12 L. ed. 928.
Landsdale v. Smith, 106 U. S. 394.
Hammond v. Hopkins, 143 U. S. 251.
Felix v. Patrick, 145 U. S. 317.
Foster v. Mansfield, 146 U. S. 88.
Badger v. Badger, 69 U. S. 87.
Wood v. Carpenter, 101 U. S. 135.
12 Enc. Pl. & Pr., 838.

XVII.

If fraud discovered in time should have pursued his remedy at law.

I Black on Judgments §§ 362-387.
Freeman on Judgments §§ 486-489.
3 Pomeroy's Eq. Juris § 1361.
Story Eq. Jur., §§ 894-896.
Bigelow on Estoppel, 151.
I Whitehouse Eq. Prac., § 152.
I Joyce on Irr., § 547.
Brown v. C. of B. V., 95 U. S. 157.
Nougue v. Clapp, 101 U. S. 551.
Parson v. Weis, 77 Pac. 1010 (Cal.)
T. P. A. v. Gilbert, 111 Fed. 269.
Graham v. B. etc. Co., 14 Fed. 753.

XVIII.

Must allege a meritorious defense to original action and specifically set forth the facts constituting it.

I Black on Judgments, § 393.
23 Cyc., 1031, 1039.
Christy v. Atkinson, 214 Fed. 1020.
Eldred v. White, 102 Cal. 600.

XIX.

If it appears on the face of the complaint that statute of limitations is a bar it may be pleaded by demurrer or motion to dismiss.

Chemung M. Co. v. Hanley, 9 Ida. 787.

13 Enc. Pl. & Pr., 201.

XX.

An action in Idaho on a contract in writing must be commenced within five years.

§ 4052 Ida. Rev. Codes.

XXI.

The judgment of dismissal shows (Rec. 47) what the court's position was as to the application of the statute of limitations, to-wit, that if the judgments were annulled as prayed for it would be ineffective and useless as the statute of limitation, said Sec. 4052, would be a bar to granting any second foreclosure.

XXII.

The statutes of Idaho provide for certain exceptions where the statute of limitations will not run, including certain legal proceedings but not mentioning appeals, therefore, the statute cannot be tolled by appeals.

ARGUMENT.

The Bill of Complaint herein attempts to set forth an equitable action in a federal court to set aside a decree of a state court, upon the ground that the decree, or a part thereof, is void for want of jurisdic-

tion of the state court to enter the same, and to set aside a foreclosure sale thereunder upon the grounds of fraud and that the sale was had in compliance with said void decree, and to again foreclose the same mortgage that was foreclosed in the state court.

The grounds of the motion to dismiss, briefly stated, are as follows: That the court has no jurisdiction of the subject-matter; that the plaintiff selected his forum, had his day in court and the federal court had no jurisdiction for the reasons alleged in the complaint to vacate the judgments of the state court; that the orders of the state court in regard to the receiver's sale are final and conclusive; that the matters herein raised to annul the judgment of the state court are *res judicata*; that the court has no jurisdiction for the reason that it is shown by the complaint that the plaintiff had plain, speedy and adequate remedies at law for the errors and matters complained of; that the federal court cannot set aside final decrees upon such fraud as alleged in the complaint; that a federal court will not set aside judgments of a state court for alleged excess of jurisdiction appearing upon the face of the record; that any relief herein is barred by reason of plaintiff's laches; that the action is barred by Sec. 4054 sub. 4 and Sec. 4050, Rev. Codes of Idaho, for want of equity in the complaint; that the facts stated in the complaint are insufficient to entitle complainant to any relief in a court of equity.

We desire to have it understood from the beginning that we accept the well-established law that a

federal court has jurisdiction under an independent equitable action to afford relief against a judgment at law of a state court, obtained by fraud, where the record is regular upon its face, and extrinsic evidence is required to show such fraud. There are many federal cases recognizing such jurisdiction of a federal court, and in fact such actions have been so litigated that the essential elements necessary to sustain such jurisdiction have become settled and universally recognized.

These essential elements may be classed as follows:

1. Federal jurisdiction.
2. An equitable ground, as fraud.
3. No adequate remedy at law.
4. Meritorious defense.
5. Laches.
6. Statute of limitations.

But we do not admit that a federal court has jurisdiction to set aside a judgment of a state court on the ground that the same is void for want or excess of jurisdiction appearing on the face of the record; on the contrary, we contend that want of jurisdiction, which does not require extrinsic evidence to show it, is not a ground which equity will recognize in this class of cases, as equity will not interfere where there is an adequate remedy at law. And especially is this so where the state court acquired jurisdiction over the parties and the subject-matter and then it is claimed the court erred in entering a judgment by granting more than the pleadings and

issues warranted. As to want of jurisdiction being an equitable ground in some cases, we admit that there are cases holding that a party may obtain equitable relief against the judgment of a state court where it appears from the face of the record that he was served with summons, when in fact he was not served, and it requires extrinsic evidence to so show, and thus the jurisdiction was obtained through artifice and fraud.

The first essential element, the federal jurisdiction, is covered in the complaint by proper allegations of diverse citizenship and jurisdictional amount.

We will, therefore, then discuss the second element mentioned above, to-wit, the equitable grounds. An examination of the complaint will show that two attacks are made, as follows:

1. One against Finding No. 149, Conclusion No. 35 and Decree in foreclosure suit in state court.

2. One against the Receiver's sale.

The ground of attack against said Finding, Conclusion and Decree is:

1. Want or excess of jurisdiction.

The grounds of attack against said Receiver's sale are:

1. That it was had in compliance with a void decree.

2. Fraud.

**CHARGES IN BILL AGAINST FINDING, CONCLUSION AND
FORECLOSURE DECREE.**

We shall first treat of the charges made against said Finding, Conclusion and Decree, and endeavor to show this Court that on the face of the complaint the attack is without merit for the following reasons:

1. That it appears on the face of the complaint that all of the issues herein made against said Finding, Conclusion and Decree are *res adjudicata*.
2. That if want or excess of jurisdiction appears on the face of the record it is not an equitable ground.
3. That the alleged error is judicial and therefore erroneous only.

We will proceed to show what the allegations of the complaint are as to the invalidity of said Finding, Conclusion and Decree. The allegations on this matter are found in paragraphs 10 (Rec. 14), 15, 16 and 17 (Rec. 20-21), and may be summarized as follows:

1. State Court exceeded jurisdiction, when validity and priority of Receiver's Certificates were not made an issue in pleadings or raised during trial, as follows:
 - a. In making Finding No. 149 and Conclusion No. 35 as to certificates being a prior lien over all other liens and mortgages.
 - b. In decreeing Receiver's Certificates prior liens.

c. Therefore, Finding, Conclusion and Decree null and void.

2. Constituted a taking of property without due process of law, contrary to 14th Amendment of the Constitution of the United States.

3. Court lacked jurisdiction over Hewitt and subject-matter.

A further examination of the complaint will show that these identical matters were raised at three different times in the state courts of Idaho, and therefore, are res adjudicata. In paragraph 10 (Rec. 14) of the complaint it is alleged that the state district court in the foreclosure suit instituted by Hewitt, Jr., plaintiff herein, on its own motion wrongfully and in excess of jurisdiction, decreed, among other things, the Receiver's Certificates issued in another action to be a prior lien to all other liens, including mortgage of said Hewitt.

**APPEAL FROM FORECLOSURE DECREE—HEWITT'S FIRST
DAY IN COURT.**

It further appears in said paragraph 10 that said plaintiff, Hewitt, Jr., was not satisfied with said decree, but attacked its validity on an appeal to the Supreme Court of the State of Idaho. The grounds of attack and those raised on appeal are specifically set forth in said paragraph 10, and show that there was then raised on appeal the same grounds as are here raised for the purpose of vacating the decree of said State Court. In order that this Court may make a comparison of the grounds of attack raised

on said appeal with the grounds of attack herein made on said decree, and hereinbefore briefly set forth in a summary, we herewith set forth the same in a concise manner, as follows:

1. That Finding 149 and Conclusion 35 were illegal and void for the reasons:

a. Hewitt not made a party in Idaho Fruit Land Company case.

b. Hewitt not served with notice or process.

c. Although at institution of suit he was a prior lien holder of record.

2. Was a taking of property without due process of law, contrary to 14th Amendment.

3. Said decree is utterly void, illegal, lacking jurisdiction of subject matter and person.

Idaho Reports Referred to in Complaint Can Be Examined by This Court.

Plaintiff herein not only sets forth in his complaint the specific grounds urged on appeal in the state court, but alleges the Supreme Court affirmed the decree of the lower court which plaintiff attacked on the ground that the same was null and void, but he also refers to the decision of the Supreme Court reported in volume 20 of the Idaho reports on page 235 (Rec. 6). While it is not necessary from the specific allegations of the complaint to resort to said decision of the Supreme Court to see what grounds were raised on appeal in the state court, and decided, we believe that this Court has a legal right from the allegations of the complaint set-

ting forth the volume and page wherein said decision was rendered, to refer to said decision. Appellant claims that this Court should not refer to said decision; that this Court cannot take judicial notice of the various decisions of the Supreme Court of Idaho. While in certain cases this may be true, we submit that where a plaintiff sets forth the specific grounds that were raised on appeal, and states what the decision of the Supreme Court was, and then refers to the book and page of the State report, that such affirmative allegations and references place the matter in such a situation that this Court can examine the decision referred to, and that in so doing it will not be taking judicial notice of said decision.

As we understand the rule, a party plaintiff cannot attach an instrument to a complaint and refer to same or refer to a decision of a supreme court by volume and page and then use said decision to supply a necessary allegation in the complaint. In other words, if it was necessary to make certain allegations to sustain a cause of action, then these allegations must be specifically alleged in the complaint and could not be supplied by a clause in an instrument that was attached to the complaint and referred to. But, on the other hand, if the plaintiff attaches an instrument, or makes reference to a certain decision, then such instrument or decision can be used by the defendant to show that no cause of action exists.

In support of the position that this Court cannot take judicial notice of such decision, appellant cites

16 Cyc., 919; 131 U. S. 151, and in stating the rule contended for, adds: "although such decisions are referred to in the pleadings." An examination of these authorities will show that they do not justify the adding of such a clause, as nothing whatever is said in either citation as to the rule applying where the decisions are referred to in the pleading.

But we believe that this Court, by one of its own decisions, *Allen v. Allen*, 97 Fed. 525, the decision being written by Justice Gilbert, has fully settled the question of a reference to the state reports in actions of this kind to determine what the Supreme Court of the State decided. This case in all law features is almost identical with the case at bar. A bill was filed in the Federal Court seeking to enjoin the defendants from claiming any right under a judgment entered in the State Court on the ground that the Court had exceeded its jurisdiction, that it was secured by fraud, etc. And in the bill two former actions were set forth between the parties, one an action to redeem from a mortgage and another an action of ejectment, and further showing that the same questions were practically passed upon by the State Court. The bill further alleged in a brief way that the judgment of the lower court in the action to redeem was appealed from and that said judgment was affirmed by said appellate court; almost the identical allegation that is made in the complaint at bar, except a reference is herein made to the Idaho reports wherein the decisions are reported. Apparently no reference was made to the California report

wherein the decision appeared on appeal, but nevertheless this Court, as shown by 97 Fed. on page 527, referred to the decision in the Supreme Court of California, as follows:

“The grounds of that decision were thereafter fully considered by the Supreme Court of California, on appeal, in *Allen v. Allen*, 95 Cal. 184, in which case the Supreme Court held, etc.”

So it appears that this Court referred to the decision of the appellate court and considered what this court had held, although no reference to the reported decision was made in the complaint, at least so far as the statement of facts shows.

On page 528 of the *Allen* decision this Court also referred to the fact that an appeal was taken in the ejectment suit and the judgment of the lower court was affirmed. The statement of this Court is as follows:

“On appeal that judgment also was affirmed by the Supreme Court of California in *Allen v. Allen*, 106 Cal. 137. In the opinion of that case the court said of its former decision in 95 Cal. 184:” (then follows the quotation.)

And neither does it appear in the bill in the Federal Court in the *Allen* case that any reference was made to the decision of the Supreme Court of California on appeal in the ejectment suit, but this Court nevertheless considered the opinion and quotes what that court held and then came to the conclusion that there had been a former adjudication of certain issues in the State Court, and if there was error in the judgment it was in the conclusion which

it reached, and therefore the bill in the Federal Court was wholly lacking in the features which authorize a court of equity to grant relief.

And we call particular attention to the fact that in the Allen case a demurrer was sustained by the lower court to the bill as in the case at bar, and that a decree of dismissal was filed from which the appellant appealed. So we considered that the questions of former adjudication appearing from substantial allegations in the complaint and also reference being made to the report wherein the decisions appear, have been settled and is the accepted law of this Court as reported in the Allen decision.

We therefore, think it proper for this Court to examine said decision if it desires, although it is not necessary to do so for the purpose of ascertaining whether or not the points urged on appeal as to the invalidity of the foreclosure decree are *res adjudicata*. Appellant contends that where a former judgment is relied on as an estoppel, it must be pleaded, and then admits that when the estoppel appears upon the face of the complaint, wherein is set forth the former adjudication, the objection may be raised by demurrer or motion to dismiss. So the only controversy between us is whether or not the complaint on its face shows that the identical questions here urged were urged before another court and decided. The allegations in the complaint as to this matter are very full and specific, and therefore, we can properly raise the question of former adjudication on our motion to dismiss.

By reference to the decision in 20 Idaho 235, it is seen that the specific allegations of the complaint are fully corroborated and that the same questions were raised on appeal as herein raised as to the validity of said decree, to-wit: that said foreclosure decree was void because it made the Receiver's Certificates a prior lien to the Hewitt mortgage, and that he not being a party, and having no opportunity to be heard, was being deprived of his property without due process of law, and that he had not had his day in court.

It is there shown that the Supreme Court in answer to appellant's contention before it that he was not a party in the other suit and that he had had no opportunity to contest the Receiver's Certificates and had not had his day in court, held:

“Whether the appellant was a party to the suit in which such receiver was appointed does not clearly appear from the findings, but there can be no question but that in the *present suit the appellant had full opportunity*, if he saw fit, to contest such receiver's certificates, and have litigated and determined by the trial court in the present suit the question as to whether such certificates should have been allowed. And there is nothing in the record to show that the appellant, at any time during the trial, made any contest or presented any matter to the trial court, or gave any reason why the court should not allow such certificates and make them a prior lien upon the mortgage property. Certainly, when the question came before the trial court in the present case the *ap-*

pellant had his day in court, and could have contested these certificates and their priority, and fully litigated and offered such proof as he had, and given such reasons as existed in the law why the court should not allow the same; but the record does not disclose that the appellant took any steps to contest these liens or in any way put in issue their priority."

So it clearly appears both from the specific allegations in the complaint and also from a reference to the decision in 20 Idaho 235 that the plaintiff herein has had his day in court as to the very matters herein placed in issue as to said foreclosure decree. We term this his first day in court on these identical matters, and now proceed to his second day in court on the same matters.

WRIT OF PROHIBITION.—HEWITT'S SECOND DAY IN COURT

In paragraph 12, (Rec. 16) of the complaint it is alleged that said Hewitt petitioned the Supreme Court of the State of Idaho for a writ prohibiting the Receiver's sale "*on the grounds heretofore alleged,*" and that upon a hearing said Court refused said petition.

So here again we have upon the face of the complaint the specific grounds which plaintiff states he presented to the Supreme Court in his application for a Writ of Prohibition, being the identical grounds urged on the appeal from said foreclosure decree. Again plaintiff alleges that the decision of the Supreme Court in said matter is reported in 21 Idaho 1.

While the allegations as to the grounds urged in the application for said writ are sufficient without any reference to the decision reported in the volume referred to, we call this Court's attention in corroboration thereof, to the fact it is clearly shown in said decision that the same grounds were urged in the application for said writ as set forth in the complaint herein, to-wit, that said Hewitt had had no opportunity to contest said Receiver's Certificates, had not had his day in Court, and that said foreclosure decree was in excess of and beyond the jurisdiction of the Court, and that there was a taking of said Hewitt's property without due process of law.

The Supreme Court was not inclined to pay much attention to appellant's objection, there urged the second time, to the effect that the lower court had no authority to decree the Receiver's Certificates a prior lien to the Hewitt mortgage, as is shown by the statement of said Court on page 8 as follows:

"It has already been adjudicated by this court that the trial court had the power and authority in this case to authorize the receiver to issue receiver's certificates and to make them a prior and first lien against the property of the company superior to all existing mortgages and other liens and encumbrances. *Hewitt vs. Great Western Beet Sugar Company*, 20 Ida. 235."

On page 5 the Supreme Court states that the Receiver became a party in the foreclosure suit and then adds:

"That he was taken into consideration and

treated as a party to the action by the decree is clear upon the face of the decree itself."

As showing that said Hewitt acquiesced in making the receiver's certificates prior to the Hewitt mortgage, the Supreme Court on page 6 sets forth a stipulation entered into by the attorneys for all parties in the foreclosure suit, whereby all parties, including said Hewitt, joined in presenting to the Receiver a copy of the decree in the foreclosure suit, wherein it was decreed that the receiver's certificates were prior to all liens, with the request that the decree be accepted and admitted by him as establishing the claims and liens of said parties.

In regard to this matter the Court on page 12 states:

"Under this state of facts, there is no doubt but that the plaintiff is, and all other parties to the foreclosure suits are, bound by the judgment and orders had in the receivership case and are subject to the order of the court directing the sale of the property without the right of redemption. In other words, the sale here being made is not a sale of foreclosure but is a sale by the court's receiver under direct authority and supervision of the court. The plaintiff has consented to and acquiesced in the order and decree and is now bound thereby."

Thus appellant had his second day in court in attacking the validity of said decree and protesting against the foreclosure sale on the same grounds as herein alleged against said decree. We now pass to the appellant's third day in court.

APPEAL FROM CONFIRMATION OF SALE.—HEWITT'S THIRD
DAY IN COURT.

In paragraph 14 (Rec. 19) of the complaint it is alleged that said Hewitt objected to the confirmation of the receiver's sale and then states the grounds of objection as follows:

“Upon the identical grounds urged in his appeal to the Supreme Court of Idaho in his foreclosure suit and in his petition for a writ of prohibition, more specifically set forth in Paragraph X of his complaint, to which reference is hereby made, and on the further ground that said sale was a taking of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.”

It is then alleged that the district court overruled said objections, whereupon said Hewitt duly appealed to the Supreme Court of the State of Idaho and that upon a hearing said court affirmed the order of the lower court.

And so again it appears upon the face of the complaint that the attack herein made upon said foreclosure decree was a third time presented to said Supreme Court. And as showing that said issues are *res adjudicata*, we have the allegation in the complaint that the questions urged upon the objections to the confirmation of the sale and presented to the Supreme Court were upon identical grounds as urged upon a former appeal and upon the said application for a writ of prohibition. And plaintiff here likewise alleges that the decision of the Supreme Court on this appeal is reported in 22 Idaho 328. An

examination of said decision will show that said Supreme Court refused to recognize any of the objections raised by said Hewitt as sufficient grounds to set aside sale or the confirmation thereof and fully sustained the order of the lower court confirming said receiver's sale.

And thus appellant had his third day in court on the issues which we are discussing and was unable to have the foreclosure decree or the receiver's sale set aside.

As showing that the federal court in the action herein has no jurisdiction to hear and determine the question of the invalidity of said Finding No. 149, Conclusion No. 35 and foreclosure decree, we will present our argument under the following heads.

1. Res adjudicata.
2. Adequate remedy at law.
3. Due process of law.
4. Must abide by forum selected.

RES ADJUDICATA.

Hewitt is estopped from now litigating the validity of Finding 149 and foreclosure decree of the State Court upon the same grounds. When the District Court entered the said finding and decree, which Hewitt claimed exceeded its jurisdiction, in that it was a taking of his property without due process of law, and that he had not had his day in court, he was entitled to have one hearing upon these grounds at some time. The hearing might have been in the same action by a motion to vacate or by motion

for a new trial or by an appeal on these same grounds. This would then constitute a trial or hearing in the District Court and the Supreme Court as to the invalidity of the decree. Or he could have treated the decree as void, if he believed such a showing made it void, and not have raised the question of the invalidity of the decree at all in the original action. But if the plaintiff did raise it and have the invalidity heard by the District Court and the Supreme Court, then he is bound by the decision of these courts.

Or if he did not care to raise the question of the invalidity on these grounds in the same action before the same Courts, and was satisfied he could establish the invalidity of the decree, not void on the face of the record, he could have waited and raised the question in a new independent action in the State Court to vacate the decree as being void upon the same grounds, but with the chance of the court saying that he should have taken his remedy at law. If he had done this, and had had a trial, he would have been bound by the final determination thereof.

Or he could have brought a similar action to vacate in the Federal Court on the same grounds.

In other words, a party is entitled to his day in Court in attacking the validity of a judgment. He can attack it in the same action at the time of the trial, by motion, or by appeal, or he can attack it in a separate action to vacate, provided excess of jurisdiction is a sufficient equitable ground; but when he has done this in either case, he is bound by the final

determination of his action. He cannot again attack its invalidity and have it tried over again in some other court. He can have his day in court to attack the judgment as being invalid, but when this has been done, the judgment is final and the same issues cannot again be tried, but are *res adjudicata*.

Hewitt attached the invalidity of the decree on certain grounds in a State Court which had concurrent jurisdiction with the Federal Court of such matters and therefore he is bound by the decision of the State Courts. Never again can he attack the invalidity of said decree on the same grounds in any other court.

Where Hewitt made his mistake if he desired to have the decree of the State District Court contested in the Federal Court, provided his contention is correct that excess of jurisdiction is a proper ground, was when he attacked the invalidity of the decree in the State Courts, and had them pass upon the same. He should not have appealed on the ground of invalidity of the decree, but have passed it by and then later have brought an action in the Federal Court on the grounds that he urged in the State Courts. The matter is therefore *res adjudicata* because it is shown in the complaint that Hewitt attacked the decree and proceedings of the Court on the same grounds at least three different times.

We admit the rule of law that jurisdiction can be questioned, but we not not admit that it can be tried a dozen times, or tried until determined in favor of the attacking party.

Courts will not re-examine questions of the validity of a decree decided by another Court for purpose of determining whether the decision was correct, either according to the principles of law or those of equity. If the Court had jurisdiction of subject matter and person as in this case, the party has had his day in court and he must correct the error on appeal or the decree will stand against him. It is the duty of a litigant to make every defense available and assert every right he has in the trial court and urge any correction he may desire on appeal. If he fails so to do, it is his own fault, and if he does raise them they become final and another court cannot help him at some future time on the matters formerly in issue.

We do not intend to burden this brief with many citations of authorities setting forth the rules as to *res adjudicata*. The cases are so numerous in holding that matters or issues which have been determined in the original action by a motion, or have been urged on appeal or by writ of error are conclusive and *res adjudicata*, that it would be imposing upon this Court to cite such cases for your consideration. And besides we do not believe there is any controversy between counsel for appellant and counsel for defendant in error as to the principles of *res adjudicata*. Appellant contends that the complaint does not show upon its face that the points which we are discussing are *res adjudicata*, and therefore, that we must plead former adjudication. On the other hand, we contend that the bill itself shows a former adjudication on the validity of Find-

ing 149, Conclusion 35 and the foreclosure decree on the identical grounds as raised in the bill of complaint herein, and therefore, we can raise the question of *res adjudicata* by motion to dismiss. We have hereinbefore shown by pointing out the allegations in the complaint as to the grounds upon which the validity of the decree is attacked in the action at bar that they are the same as raised in the State District and Supreme Courts. If this be true, then the decision of the lower court on our motion to dismiss as to these matters should be sustained.

We will however call the Court's attention to the general law on this point so well set forth by Judge Dietrich in the case of *United States vs. Andersen*, 169 Fed. 205. In that action an application was made by the United States to set aside a certain certificate of naturalization on the ground that the state court had no jurisdiction to issue the same. The state court had held it had jurisdiction and granted the certificate. No appeal was taken by the United States. The federal court dismissed the application and in so doing states as follows:

"This court is not urged merely to reach a conclusion out of accord with that of the state court upon a question raised in an action entirely independent of the proceedings in the state tribunal.

* * * By the petition here this court is asked to review merely a legal conclusion, deliberately adopted by a court of co-ordinate jurisdiction, upon a question arising upon the same facts as are here presented, and virtually to send its process into that court requiring it to vacate and set aside

its own judgment. Such a function is in its nature revisory, and necessarily implies superiority, which, under the general provisions of the law, this court does not possess. *Little Rock Junction Ry. vs. Burke*, 66 Fed. 83, 13 C. C. A. 341; *Blythe vs. Hinckley*, 173 U. S. 501, 19 Sup. Ct. 497, 43 L. Ed. 783."

In *Forsythe vs. Hammond*, 166 U. S. 517, the general rules of *res adjudicata* are well stated where lack of jurisdiction was one of the grounds urged against the judgment of the state court; it was there held:

"Now, it is no less a judicial function to consider whether those proceedings and that decree were valid and effective, and determine that they were and operated to annex plaintiff's territory to the city, than to enter upon a like consideration and determine that they were invalid and ineffective to make such annexation. The decision of the Supreme Court of Indiana was in favor of the validity, that of the court of appeals against their validity, and if it is judicial to hear and determine one way, it is likewise judicial to hear and determine the other. If action by the state tribunal stopped with the decree of the trial court, it might be said that the plaintiff did not voluntarily seek that forum. She was brought in by appropriate process, and compelled to there litigate the question. But after an adverse decree she insisted that it was not only erroneous but void, and voluntarily commenced an action in the supreme court of the state to have that claim established. She invoked the jurisdiction of that court. She summoned the city of Hammond into that forum and there chal-

lenged the decree of the circuit court, challenged it for error and also *for lack of jurisdiction*. The questions both of error and of jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the supreme court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principle of *res judicata* apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? The question is not whether the judgment of the supreme court would be conclusive as to the question involved in another action between other parties, but whether it is not binding between the same parties in that or any other forum.

ADEQUATE REMEDY AT LAW.

The said Hewitt tried three remedies at law and still had a fourth, an appeal to the Supreme Court of the United States. He must account for a failure to pursue such remedy. Under this principle of adequate remedy at law in actions like the one at bar, we again find that the rules in relation thereto are so well settled as to warrant little or no controversy. If a remedy at law exists, it must be pursued. One may have several concurrent remedies at law, as a motion for a new trial, a motion to vacate in an original action, an appeal, writ of error, writ of review, etc. The best rule as sustained by a great weight of authority is that the party must first exhaust all his

remedies at law. So the first question to determine is, Has time for remedy at law expired? If the time for prosecuting his remedy at law has expired, then the next question is, Why? If by his own or counsel's fault, neglect, inattention, mistake in law, etc., then equity will not grant relief. And so it is necessary in actions of this kind, to vacate the judgments of a state court, for the plaintiff to allege and show that he had no remedy at law, or if he had one, he lost same through no fault or neglect of his own. The allegations in the complaint show that a federal question was raised by Hewitt in the original action of the taking of plaintiff's property without due process of law contrary to the 14th Amendment of the Constitution of the United States, and the failure to show whether such remedy was pursued, or if it was lost, that it was not through the fault or neglect of said Hewitt or his counsel.

No judgment of the State Court can be set aside either by a State or Federal Court on the ground of some point affecting the validity of the judgment which might have been raised in the State Court, in other words, where an adequate remedy at law existed. The remedy in such instances is always a review of the judgment of the State Court by an appeal. If a defendant appeared in an action in the District Court of the State and failed to raise some question which he might have raised there, such as taking of his property without due process of law, etc., and then does not appeal to the Supreme Court, he is forever barred from raising this question. In such

a case no action could be brought in a State Court or Federal Court after the time to appeal had expired to set aside the judgment of the District Court on the ground that that Court had erroneously ruled and had taken his property in that action without due process of law.

And the same would apply if one appeared in an action in the State District Court and later appealed to the Supreme Court of the State and raised the question of due process of law. He cannot stop there and wait until the time to appeal on this question to the United States Court has expired and then seek to review the decisions of the District and Supreme Courts by an independent action in the Federal court. No, he had an adequate remedy at law by appeal and if he did not pursue same he cannot complain. In the case at bar, no action could be sustained in any State Court of Idaho to set aside the decisions of the District and Supreme Courts of the State on the ground of Hewitt's property being taken without due process of law. So a party cannot appear in an action in a State Court and not raise a question of law which might properly be raised and cease defending after a judgment in the District Court, if a federal question was raised which would make it appealable to the United States Supreme Court, and then expect relief in a Federal District Court in another action wherein is raised the same law question. All actions to review law points of this kind or errors of the State Courts would be purely cases of review and not

independent actions on a new issue and therefore can not be sustained.

So the test must be: Can the action which is being brought in the Federal Court be such an action as could be brought in the State Courts upon the same grounds to vacate a judgment obtained in the State Court?

In *Ewing vs. City of St. Louis*, 72 U. S. 413, it is held:

“The complainant can ask no greater relief in the courts of the United States than he could obtain were he to resort to the state courts. If in the latter courts equity would afford no relief, neither will it in the former.”

The above is cited with approval in *Union Pacific R. Co. vs. Flynn*, 180 Fed. 572.

If the present complaint was filed and now pending in the State Court of Idaho to set aside the judgment of the District Court, what would happen? Why, the Court would examine the complaint and find plaintiff is raising the same question, viz: “due process of law,” “void decree,” etc., that had been raised and passed upon three times by the Idaho Courts, and would therefore hold plaintiff was simply trying to review law questions which plaintiff had an adequate remedy at law to review by appeal to the Supreme Court of the United States.

The general rule on this point is well stated in *I Black on Judgments*, Sec. 361 as follows:

“Embarrassing questions sometimes arise as to the right and power of equity to interfere by in-

junction against a judgment while the party has a concurrent and equally efficacious remedy by application to the court which rendered the judgment, or by appeal to a higher court. The general rule, however, as established by the best authorities, is that the party seeking relief must have exhausted all his resources at law, for equity will not grant an injunction where there is an adequate remedy at law. Nor will the court grant an injunction to stay proceedings in another court having the same power to grant relief."

Again in Sec. 363:

"In pursuance of the same general principle, the party must have exhausted his possible remedies by appeal, writ of error, or certiorari, before equity will hear him. If, by failing to appeal, or by prosecuting an appeal in a defective or insufficient mode, he loses his remedy at law, he cannot proceed in equity by injunction, unless new and sufficient equities be alleged. Nor will a judgment be enjoined when the complainant has neglected to except to it as he might have done."

DUE PROCESS OF LAW.

One of appellant's contentions is that the foreclosure decree is void for the reason that it is a taking of his right and interest in the mortgaged property without due process of law. It is alleged in the complaint that the validity or priority of certain receiver's certificates was not made an issue in the pleadings in said foreclosure suit nor raised during the trial of said suit, but, nevertheless, the State Court

decreed that said certificates were prior to the Hewitt mortgage.

Our contention is, that the State Court in said foreclosure action had jurisdiction of the parties and subject matter, and that even if the court made a wrong decision in decreeing the priority of the liens and gave a prior lien which was not raised in the pleadings that the said Hewitt had an adequate remedy at law to appeal from said decree, and having so appealed, is bound by the decision of the Supreme Court. On his appeal Hewitt urged that it was a taking of his interest in property without due process of law and contrary to the 14th Amendment. The Supreme Court passed upon this question and came to the conclusion that his property was not being taken in violation of the 14th Amendment and without due process of law. Having had this question presented to it, and having passed thereon, its decision could only be treated as erroneous and subject to review or correction on appeal to the Supreme Court of the United States.

This matter was passed upon by this Court in *Allen vs. Allen*, 97 Fed. 525, hereinbefore referred to. There had been two former actions in the State Court from both of which appeals had been taken to the Supreme Court of California and the judgment of the lower court sustained in both cases. A bill in equity was then filed in the Federal Court to enjoin the defendants from claiming any rights under the judgment on the grounds that the judgment was in excess of the court's jurisdiction, was secured by

fraud, that it took plaintiff's property in violation of law, and without due process of law, that it impaired the complainants contract, etc. A demurrer was filed to the bill on the ground that said suit in equity was barred by the prior judgments of the State Courts; that the Federal Court had no jurisdiction to grant relief prayed for and that there was no equity in the bill. This Court sustained the demurrer and entered decrees dismissing the bill.

This Court held:

"A Court of Equity cannot set aside a judgment at law, rendered by a Court which had jurisdiction, on the ground that it was not warranted by the pleadings."

And again on pages 530 and 531:

"The appellant makes the further contention that the judgment in the ejectment case was rendered on pleadings which presented no issue and that, therefore, the judgment is void. To this it may be said that, if it was believed that the court erred in the ejectment suit in rendering judgment in the face of the admission that such written offers had been made, the remedy was to have brought the matter before the appellate court on the appeal from the judgment. This court has not the power now to correct the error, if error there were in the conclusion of law at which the court arrived in the ejectment suit in ruling that * * *"

In *Union P. R. Co. vs. Flynn*, 180 Fed. 565, wherein the plaintiff claimed that the State Court had acquired no jurisdiction by reason of no notice served upon him, therefore, the proceedings were void for

want of jurisdiction and amounted to a taking of property without due process of law, it was held:

“That where a property owner, against which a special tax bill had been ordered, claimed that the proceedings were void for lack of proper notice, it had an adequate remedy at law in the State Court either by a proceeding under Section 4, or by certiorari, and hence could not maintain a bill in the Federal Circuit Court to restrain the city clerk from attesting and the circuit clerk from filing the tax bills against its property on the theory that to do so would constitute a taking of property *without due process of law*.”

In 23 Cyc. 1004 it is stated:

“The trial court having had jurisdiction of the parties and the subject matter, its judgment will not be set aside or enjoined in equity on an allegation that it is not sustained by the pleadings in the case.”

MUST ABIDE BY FORUM SELECTED.

The appellant having tried the State Courts now desires to try the same question over again in the Federal Courts and see if he cannot finally find some court who will view the law as he does.

He was plaintiff in the foreclosure action in the State Court. He selected his own forum. He could have brought his foreclosure action in the Federal Court if he desired. The Courts frown upon such complaints after a voluntary selection and trial.

In Bailey vs. Willeford, 126 Fed. 803, a case where defendant could have selected his forum by removal but chose the State Court, was defeated and appeal-

ed to the Supreme Court which affirmed the lower court, then brought another action in the State Court to set aside the judgment, and while an appeal was pending filed a bill in the Federal Court for relief, it was held:

“That defendant, having elected to litigate the whole matter in the State Courts, and having fully presented his entire case to those courts, the Federal Court would not take jurisdiction.”

And again on page 806 it is stated:

“Unless there is something in the present bill calling imperatively upon this court to interfere, the above statement would seem to conclude the case. The complainant comes now into this court to correct, as his counsel in argument say, an injustice done him in the State Court. His issue was tried before a judge of the highest character, instinctively a just man. This judge presided at the trial of the case, and on the motion for a new trial reviewed it, and refused a new trial. It was then carried to the Supreme Court. That Court, under the law of North Carolina, can grant a new trial on errors of fact. The verdict and judgment below were affirmed by this tribunal, whose impartiality, wisdom and integrity cannot be questioned. It came again into the Superior Court, and was again heard on the ground that the verdict was obtained by fraud and perjury, and the verdict and judgment were sustained. The record discloses not even a hint that this action of the Court was otherwise than that which all know it to be, the calm judgment of a just and unprejudiced judge. The aid, then, of a court of equity was sought on a case almost precisely like that

made in this court now, and this aid was refused. The complainant is too late in seeking the aid of this court from supposed injustice in the State Court. He could have removed his case at its inception into this court because of diversity of citizenship. If he had any reason to fear prejudice or local influence, he could remove it into this court at any time before trial. *He deliberately selected his tribunal.* He made all his defenses in it. He took every chance for a successful result. Having experimented in the State Court, he cannot repeat his experiment here."

In Forsyth vs. Hammond, 166 U. S. 506, it is stated:

"One who has voluntarily sought the judgment of the Supreme Court of a state to declare that a decree of a lower court was not only erroneous but *void*, although not a voluntary litigant in the trial court, is bound by the judgment of the Supreme Court, as *res adjudicata*, and cannot attack it collaterally in a Circuit Court of the United States."

A FEDERAL COURT HAS NO JURISDICTION TO SET ASIDE A
JUDGMENT OF A STATE COURT FOR ALLEGED WANT
OR EXCESS OF JURISDICTION APPEARING
ON THE FACE OF THE RECORD.

We believe that we have heretofore shown that the attack on the foreclosure decree is *res adjudicata*, that the appellant had an adequate remedy at law and pursued same, but we further contend that if the alleged errors complained of, want or excess of jurisdiction, appear upon the face of the record, a Federal Court will refuse to grant equitable relief.

Appellant contends that the record in the Idaho Fruit Lands case shows he was not made a party therein or served with process, and further that the pleadings in the foreclosure suit show that the validity or priority of the receiver's certificates was not made an issue, but nevertheless the District Court, of its own motion, and in excess of its jurisdiction found on these matters and decreed them prior to the Hewitt mortgage.

It appears that there are several federal cases which hold that want of jurisdiction is a sufficient ground, but an examination of these cases will show that the want of jurisdiction did not appear upon the face of the record, and all of them were cases where the record showed that the State Court apparently had acquired jurisdiction of the person of the defendant, either by personal service or by publication. Then the defendant went into the Federal Court with a complaint on the ground that the record was false, that in fact he had never been served and had no knowledge of the action, or if the service was by publication that the affidavit upon which the publication was based was false, or that the attorney who appeared for him was unauthorized. The Federal Courts have held in this class of cases there is to be an investigation of a *new* case arising upon *new* facts. And so it will be found that in all these cases the invalidity of the decree in the State Court is not apparent upon the face of the record. But there is another class of cases, followed by a great weight of authority and equally well defined,

which hold that where the record discloses that the judgment is void then equity will not intervene; and especially is this true where, like the present case, the court had jurisdiction of the parties and of the subject matter, but in entering judgment it erroneously or in excess of jurisdiction held that one lien was prior to another and there is no charge of fraud. In such cases it is held that the party was properly before the State Court on a subject matter within its jurisdiction and that then if the court granted a decree giving more relief to one party than he was entitled to then the remedy, if the judgment was erroneous, was by an appeal for a correction of the judgment, or, if beyond the jurisdiction of the court and void, it could be disregarded or set aside upon motion in the original action, or upon appeal.

The leading federal case on this question is *Little Rock Junction Ry. vs. Burke*, 66 Fed. 83, and we therefore call the Court's special attention to this case, wherein it was held:

"The Federal Courts have no jurisdiction of a suit to set aside a decree of a State Court, on the ground that such decree is utterly void when tested by an inspection of the record, since in such case a motion, appeal, or bill of review, in the Court which made the decree, is the proper and sufficient remedy."

And again on page 87 it is stated:

"We have been thus particular in describing the character of the testimony that was offered and the nature of the issue that appears to have been

tried and determined in the Circuit Court, for the purpose of showing that the trial of the case clearly resolved itself into a review of the proceedings of the Pulaski Chancery Court for matters apparent on the face of the record. It is manifest that the evidence offered to impeach the decree in the suit to foreclose the tax lien was such testimony as would have been admissible to support a bill of review, or a motion in the nature of a bill of review, to vacate the decree, had the complainant seen fit to commence a proceeding of that kind in the Pulaski Chancery Court. It is also obvious, we think, that if the decree of the Chancery Court is in fact void on the ground that was and is relied upon to establish its invalidity,—that is to say, for want of jurisdiction apparent on the face of the record,—then the complainant could have obtained as full relief by a bill of review filed in the Chancery Court as by an original bill filed in the Federal Circuit Court. In addition to the consideration that a bill of review would have furnished an adequate remedy, it must be also borne in mind that the remedy by appeal was originally open to the complainant if he had seen fit to prosecute an appeal. Moreover, it is a general rule that, unless restrained by the terms of an express statute, a court of superior jurisdiction has power at any time to vacate its own judgments when it appears from an inspection of its record that a particular judgment or decree is utterly void for want of jurisdiction either over the person or the subject matter. This is an inherent power, which all courts of superior jurisdiction possess as a necessary part of the machinery for administering justice, and as a means of preventing their orders and decrees from becoming instruments in in-

justice. Black, Judgm. §§ 297, 307, and cases there cited.

Inasmuch, then, as the case at bar was essentially a suit to annul the decree of the Pulaski Chancery Court and the proceedings that had been taken thereunder, for the alleged reason that the decree was utterly void when tested by an inspection of the records, it becomes important and necessary to inquire whether the Circuit Court could properly entertain jurisdiction of a suit of that nature. It may be admitted that the Federal Circuit Courts have power to entertain suits to enjoin persons from asserting any right or title under a judgment or decree of a State Court of coordinate jurisdiction, that is alleged to have been obtained by fraud or collusion. *Gaines vs. Fuentes*, 92 U. S. 10; *U. S. vs. Norsch*, 42 Fed. 417. Possibly, a bill in equity to obtain the same relief may be entertained in any case where it is shown by proper averments that the judgment of a State Court which is apparently regular and valid, and for that reason is not subject to collateral attack, for some reason not disclosed by the record is in fact invalid and of no effect. A complaint alleging such facts would furnish a proper foundation for an original suit in equity because additional issues would be raised and new facts would be brought upon the record as the basis for independent judicial action. But a complaint or a petition which seeks to impeach a decree, without the aid of extrinsic evidence, for want of jurisdiction apparent upon the face of the record, simply imposes upon the court to which it is addressed the duty of re-examining questions that have once been tried and decided, and for that reason a proceed-

ing of that nature cannot be regarded as a new action, but is rather a continuation of the original suit."

In *Blythe vs. Hinckley*, 84 Fed. 246 it is held:

"A federal Court will not assume jurisdiction of a suit to vacate or annul a decree of a State Court for alleged want of jurisdiction appearing on the face of the record."

The above case was sustained on appeal to the Supreme Court of the United States, 43 L. Ed. 783.

In *Nat. Sur. Co. etc., vs. State B. etc.*, 120 Fed. 593, it is held:

"But it has no power to take such action on account of errors or irregularities in the proceedings on which the judgment or decree is founded, or on account of erroneous or illegal decisions by the court which rendered the judgment or decree."

In *U. S. vs. Andersen*, 169 Fed. 201, it is held:

"Where in proceedings for the naturalization of an alien in a State Court that court deliberately reached a conclusion favorable to its jurisdiction, and adverse to the government's contention, and no steps were taken for review by the Supreme Court of the state, which alone could give an authoritative construction of the local law on which the jurisdiction depended a Federal District Court would not take jurisdiction of an application by the government to set aside the certificate of naturalization granted in the State Court proceedings, having only concurrent and not *revisory* jurisdiction."

In *I Black on Judgments* § 297a, it is stated:

"The Federal Courts have no jurisdiction of an

action or proceeding to vacate or set aside a judgment rendered by a State Court, on the ground that the same is void for want of jurisdiction, or is erroneous or irregular; for, in such case, the proper and sufficient remedy is by motion, appeal, or bill of review in the Courts of the state."

In *I Black on Judgments* § 358 it is stated:

"As to the particular case of a judgment that is absolutely void, however, the authorities do not agree. Some of the decisions hold that the defendant in a judgment cannot have equitable relief against it because it is either erroneous or void, since, if *void*, it may be disregarded or may be set aside on motion, and if erroneous it may be revised on appeal. There is much to be said in favor of this view, especially in contemplation of the known reluctance of equity to interfere if any adequate remedy offers itself at law."

In *I Joyce on Injunctions* § 556, it is stated:

"Where a Court has no jurisdiction of a matter before it a Court of equity will not enjoin the proceedings for in such a case a judgment rendered will be void, as will also an execution issued thereon and in such a case the remedy at law is ample and adequate."

In *Kaufman v. Drexel*, 76 N. W. 559, it is held:

"An action may be maintained to enjoin the enforcement of a void judgment when there is a concurrence of the following conditions: (1) The judgment must be without any legal or equitable basis. (2) Its invalidity must not appear on the face of the record. (3) The party complaining must be without an adequate remedy at law."

In 11 Enc. Pl. & Pr. 1201 it is stated:

“On the other hand, where it appears from the bill that the judgment is wholly void for want of jurisdiction over person or subject-matter, or for other reasons, a good cause of action exists in some states on that ground alone. * * * * The contrary doctrine, however, seems more in accord with the nature of equitable jurisprudence, which takes cognizance of the acts of the person rather than of the defects in a law judgment. Where it obtains, a bill grounded only on the invalidity does not state a cause of action, but complainant is left to remedy at law.”

ERRORS, IF ANY, WERE JUDICIAL AND ERRONEOUS ONLY

Again, are not the errors complained of herein as to said finding, conclusion and foreclosure decree judicial errors? Where the court has jurisdiction of the subject matter and the parties in the original action then the following are mere errors at law:

1. That complaint or pleadings will not warrant the judgment.
2. That judgment is not supported by findings.
3. That judgment is excessive.

In I Black on Judgments, Sec. 367, it is stated:

“Nor can a court of equity set aside a judgment, rendered by a court which had jurisdiction, on the ground that it was not warranted by the pleadings.”

In I Black on Judgments § 271 it is stated:

“Where nothing whatever is shown, if evidence were necessary to have authorized the particular decision complained of, it will be presumed that

the evidence was before the court and that it fully justified the conclusion reached. If a party rely upon the fact that there was no evidence in a case, where evidence was necessary, he must establish it by a proper bill of exceptions, or he will fail."

As heretofore shown, this court, in *Allen v. Allen*, 97 Fed. 525, has so held, and said case is cited to support the quotation set forth above from Black on Judgments. Many other cases are also cited by that author.

In *Preston v. Kindrick*, 27 S. E. 588, it is held:

"Though the pleadings and proof in a suit by a vendor to subject the land to payment of the price did not authorize a personal decree against defendant for the deficiency after sale, where the court had jurisdiction of the parties and the subject-matter, rendition of the personal decree was merely an error for which relief could be had under Code § 3451, and hence equitable relief against such decree would not be granted."

Again it is further held:

"Relief in equity will not be awarded against a judgment or decree on the ground that the complaint in the cause did not warrant it, where the court had jurisdiction of the cause and of the parties."

And again in the decision it is stated:

"It is insisted that the bill in the case of *Preston v. Kindrick*, etc., did not warrant the court in rendering a personal decree against Mrs. Kindrick for the residue of the purchase price of the land remaining unpaid after crediting upon it the proceeds of sale, and that as to this sum the court was

clearly without jurisdiction, and its decree is void. Conceding that the pleadings and proof in that case did not authorize a decree against her for that sum, it was a mere error of the court. The court had jurisdiction of the parties and of the subject-matter."

In *I Black on Judgments*, Sec. 367, it is also stated that a court of equity will not set aside a judgment, rendered by a court which had jurisdiction "because there was no finding of fact to support the judgment."

In *Petelka v. Fitle*, 51 N. W. 131, it is held:

"A judgment is not void for want of a finding of fact to support it. While it is erroneous and subject to reversal, by proper proceedings brought for that purpose, yet the lack of such a finding is no cause for enjoining the collection of the judgment."

It is also further held:

"The sole defect in the record is that it contains no finding of fact; but the want of a finding does not render the judgment void. It is merely erroneous, and would be sufficient grounds for reversal in proper proceedings brought for that purpose."

**SAME RULE WHERE JUDGMENT IS FOR EXCESSIVE
AMOUNT.**

The present case would be like one where the court entered a judgment for an amount greater than plaintiff's demand. In such a case we understand the rule to be that the judgment for the excessive

amount is irregular and erroneous and liable to reversal but is not void.

The rule seems to be well stated in I Black on Judgments, Sec. 138:

“And first, it is an undisputed rule that if a judgment be rendered for a greater sum, whether by way of debt or damages, than is laid in the *ad-damnum* clause, or claimed in the declaration, petition or complaint, or notified to the defendant by the demand in the summons, then the judgment will be erroneous and liable to reversal * * *. But it must be observed that a judgment so rendered for an excessive amount is not void.” (Citing many cases.)

In *Henderson v. Moore*, 34 S. E. 446, it is held:

“Injunction will not be granted to restrain enforcement of an execution on the ground that the judgment is excessive, the court in which it was rendered having jurisdiction, and no fraud being alleged. The irregularity, if any, should have been corrected by appeal, or motion.”

The plaintiff in the action at bar must allege, in order to secure equitable relief, that the point passed upon by the state court which he claims exceeded the jurisdiction of the court must not have been intended by the court but was entered through fraud or accident or mistake; otherwise the plaintiff's remedy was at law. If the error made which is claimed to be in excess of the jurisdiction of the court is judicial instead of merely clerical, arising from the application of the mind of the court to the facts in the case and resulting in the award of a sum greater than it

should justly be, equity has no power to interfere, the remedy being by appeal or other appropriate proceeding at law.

In I Black on Judgments, Sec. 367, it is further stated:

“So, an illegal allowance in a judgment, or an error in the calculation of interest, is no ground for an injunction.”

Then that author goes on to state that if the judgment had been entered for an amount not intended through fraud equity would grant relief. So it appears that if the court, after consideration, knowingly entered a judgment for an amount which it deemed proper, in a case where it had jurisdiction of the parties and subject matter, even though it exceeded its jurisdiction or decreed on a matter not before it by the pleadings but being in relation to the subject matter, such judgment is erroneous and the remedy is by motion or appeal in the original action. It is not like a case referred to by the same author wherein a judgment would be void if the court exceeded its jurisdiction and passed upon a matter that was entirely foreign to the action, for instance in a case referred to by said author, where a foreclosure suit is brought and a man and his wife, being parties thereto, a decree of divorce is granted. There can be no question about such a decree being void, but even then, as heretofore shown, a court of equity is not the place to correct such error. But where the court, having jurisdiction of the person and parties, enters a decree in regard to the very

property in litigation, which point might have been put in issue by the pleadings, we then have an erroneous decree only, at least so far as an equitable action is concerned.

**NO MATTER WHETHER FORECLOSURE DECREE BE VOID ON
FACE OF RECORD, OR ERRONEOUS, EQUITY
WILL NOT RELIEVE.**

If the record on its face shows the court actually did exceed its jurisdiction, then it is void or partially void. However, many authorities hold that a record which merely shows that the court passed on a question or point not warranted or placed in issue by the pleadings is not void on its face, but erroneous. The same is true if the judgment is not supported by a finding. Then it is incumbent upon the party to proceed in the original action by motion for a new trial and call the lower court's attention to the error, and if it refuses to correct same, then to appeal and take up a record of the testimony and ask for a reversal.

This is appellant's situation exactly as his main contention as to the invalidity of the foreclosure decree is, first, that the decree is not warranted by the pleadings and proof, and second, that Finding 149 was not supported by the evidence.

Said Hewitt sought to correct these errors by appeal and took up a record of the pleadings and proof and lo and behold the Supreme Court found that the decree is valid, that it is warranted by the plead-

ings and proof and that Finding 149 was a proper finding. Now as to the foreclosure decree he is raising nothing new here, it is the same old complaint he presents, to-wit, that the decree is not supported by the pleadings and said finding was improper in the foreclosure suit.

So if the errors complained of in this regard are erroneous, plaintiff has no standing in this Court, his remedy was an appeal and he pursued same.

So, also, if it is held the record on its face shows the foreclosure decree is void, then equity will grant no relief. In either case, to give equity jurisdiction, new facts must be placed in issue, as fraud in obtaining the excessive decree.

We understand the law to be that the "matter in issue" is not determined solely by the pleadings, but may include material matter which arises during the trial and is controverted between the parties, and is made the subject of evidence and argument. In *I Black on Judgments*, Sec. 614, it is stated that this is a much better rule than one holding that the "matter in issue" must be determined upon the face of the pleadings in the former proceedings. In such cases the doctrine of *res adjudicata* does not rest upon the fact that a certain point has been made an issue by the pleadings, but upon the fact that it has been fully and fairly investigated and tried. And again some of the cases go so far as to hold that a judgment is conclusive not only upon the questions actually contested and determined, but upon all matters which, under the issues, might have been litigat-

ed and decided in that suit. It seems that by a great weight of authority that the "matter in issue" is a material point or question raised by the parties in their pleadings or drawn into controversy by the course of the evidence.

Placing appellant in the very best position that is permissible, under the allegations of the complaint herein, the federal court has before it a record of the state court in the foreclosure suit, which fails to show *affirmatively* that it had jurisdiction under the pleadings to pass upon the priority of the receiver's certificates, while yet the record does not show want of jurisdiction because it is presumed that the court had jurisdiction to enter the decree and that the question of the priority of the receiver's certificates necessarily arose during the course of the trial, and that there was ample proof to support Finding 149 and the Decree on this point.

Clearly this is a matter which could only be reviewed and determined in the original action unless there is a charge of fraud in the obtaining of the decree on this point. What would have been the proof of appellant herein if he had been allowed to proceed to trial in the federal court? It would have been the judgment roll in the foreclosure suit and further a transcript of the evidence showing that no proof was offered as to the receiver's certificates. In other words, there would have been nothing examined except the records, proceedings and evidence in the foreclosure suit. It would simply be a review and there would be no issue raised upon new facts which

is always necessary in actions of this kind to vacate a judgment of a state court.

The test is: Would the evidence offered to impeach the decree in the suit to foreclose be the evidence which could have been embodied in a bill of exceptions or record on appeal, or would it be new evidence entirely outside the record and evidence in the foreclosure suit, such as attacking the obtaining of the decree on the ground of fraud? Again suppose a motion for a new trial had been made, would the record and testimony in the foreclosure suit when presented be sufficient to show the court that it had entered a decree not warranted by the pleadings or the proof? There can be no question that the record and evidence in the foreclosure suit would settle the entire matter and it would not be necessary to resort to extrinsic evidence. Such being the case, a federal court, if it took jurisdiction, would simply be exercising revisory jurisdiction and simply reviewing matters actually presented to the state court, which is contrary to all the federal authorities on this point.

CHARGES IN BILL AGAINST RECEIVER'S SALE.

We will now pass to the consideration of the grounds of attack alleged in the complaint against the receiver's sale.

They are as follows:

1. That it was held in compliance with a void decree.

2. Fraud.

The first ground has been fully considered in treating with the validity of the foreclosure decree. The fraud and conspiracy charged in the complaint may be divided as follows:

1. Fraud of Isaachson, Receiver, in action of Idaho Fruit Lands Co., Ltd., v. Great Western Beet Sugar Co. et al.

2. Fraud of Bradley at receiver's sale.

3. Fraud of Watkins and Cannon, Receiver, at receiver's sale.

We will treat of these in the order above given.

Fraud of Isaachson, Receiver.

It is alleged in paragraph 8 of the complaint (Rec. 8) that Hewitt was not made a party in the Idaho Fruit Lands Co. case; that Isaachson was appointed receiver; that he issued receiver's certificates amounting to \$17,675; that Hewitt verily believes that said certificates were false, fraudulent and padded, and issued for illegal claims, and issued as a result of illegal conspiracy with parties in whose favor the certificates were drawn, and that the obligations paid by said certificates were incurred by reckless and indifferent management on the part of said receiver.

The allegations just referred to merely amount to the contention on behalf of appellant that he has had no opportunity to contest the validity of said certificates, not having been a party in the action wherein they were issued. But we contend that the complaint further shows that said Hewitt did have an

opportunity to contest said certificates and that he accepted such opportunity in the foreclosure action of Hewitt v. The Great Western Beet Sugar Co. In that action the court made Finding No. 149, which is a part of the record herein, and therein recited the facts in regard to the issue of said certificates in the Idaho Fruit Lands Co. case and then made Conclusion No. 35, also part of the record herein, to the effect that said receiver's certificates had priority over all other liens and then a decree was entered upon this point decreeing said certificates to be prior to all other liens. Here was appellant's opportunity to contest said Finding, Conclusion and Decree, and the complaint herein further shows that he contested these very matters on appeal to the Supreme Court from said Decree. Said Hewitt on said appeal took the same position before the Supreme Court as is taken herein but the Supreme Court held that while he may not have been a party in the Idaho Fruit Lands Co. case that the question of the priority of the said certificates arose in this foreclosure suit and that he had an ample opportunity to contest the same. The Supreme Court, 20 Ida. 248, to which decision reference is made in the complaint herein, states:

“Whether the appellant was a party to the suit in which such receiver was appointed does not clearly appear from the finding, but there can be no question but that in the *present suit the appellant had full opportunity*, if he saw fit, to contest such receiver's certificates, and have litigated and determined by the trial court in the present suit

the question as to whether such certificates should have been allowed. And there is nothing in the record to show that the appellant, at any time during the trial, made any contest or presented any matter to the trial court, or gave any reason why the court should not allow such certificates and make them a prior lien upon the mortgaged property. Certainly, when the question came before the trial court in the present case the *appellant had his day in court, and could have contested these certificates and their priority*, and fully litigated and offered such proof as he had, and given such reasons as existed in the law why the court should not allow the same; but the record does not disclose that the appellant took any steps to contest these liens or in any way put in issue their priority."

Therefore, the charges in the complaint herein on the fraud of Isaachson are *res adjudicata*, and appellant has no right to have these same matters litigated again in any other court.

Fraud of Bradley.

In paragraph 13 of the complaint (Rec. 16) it is alleged that one L. G. Bradley attended the sale and wrongfully and fraudulently, and without any authority, represented himself to be the agent and representative of said Hewitt, and pretended to have authority to bid on his behalf. There are no allegations following these charges to the effect that said acts of Bradley in attending the sale and representing he had authority to bid for Hewitt had any effect whatever on the sale. There are no allegations

that said Bradley so conducted himself at said sale that would interfere in any way so as to prevent a fair sale. How his merely attending the sale and representing he had authority to bid for Hewitt caused any other not to bid at the sale does not appear. So the allegations as they stand amount to nothing and are insufficient for any purpose, deserve no consideration and in no way strengthen the complaint. In other words, they are insufficient to show that such acts were successful in preventing a fair sale.

In the same paragraph it is further alleged that said Hewitt had been advised by counsel not to be represented at sale or bid thereat for the reason that the foreclosure decree was void, and he, therefore, refused to attend said sale or to bid thereat, or to recognize the authority of the receiver to sell. His purpose evidently being that he would stay away from the sale, take no part therein, and thereby would not consent to what he presumed an illegal sale, and also not waive any right to question the validity of the sale. On appeal to the Supreme Court, as shown by the complaint herein, the foreclosure sale was held valid. So it appears that counsel gave him wrong advice. It was, therefore, by reason of his own fault and neglect that he did not attend the sale and protect his own interests, and he must, therefore, stand the consequences. If he had attended the sale he could have prevented the property being sold for the amount of the minimum bid fixed by the court, and, no doubt, he would have done so,

if, in his judgment, the property was in fact as valuable as he alleges.

And again we claim that the issues herein raised as to the wrongful acts of Bradley are *res adjudicata* as having been presented to the Supreme Court by said Hewitt on appeal from the order of the court confirming the sale. The question of Bradley's acts in attending the sale and refusing to bid, and thereafter resuming negotiations with the attorney for the receiver and others was before the Supreme Court on said appeal as is shown by reference to 22 Ida. 332, referred to in the complaint herein.

Fraud of Watkins and Cannon, Receiver.

In paragraph 13 (Rec. 16) it is alleged that Watkins and Receiver Cannon conspired to deprive plaintiff of his right and extinguish his lien and to bid in the property for the amount of the receiver's certificates and the liens prior to the mortgage of said Hewitt, and that they stifled competition. It is further alleged that the minimum bid was excessively low and wholly disproportionate to the true value.

A part of these charges as to the minimum bid being excessively low and covering only the receiver's certificates and other liens prior to the Hewitt mortgage are *res adjudicata* as they were matters which were urged on the writ of prohibition as appears by the decision of the Supreme Court, 21 Ida. 1, as referred to in the complaint herein. This leaves for consideration the charge of conspiracy between Watkins and Cannon to stifle competition.

We contend that this charge against the receiver's sale is insufficient for the following reasons:

1. That said Hewitt litigated his objections to the confirmation of said sale and should have assigned all of his grounds and made a complete defense at one time.

2. That the allegations of fraud are insufficient.

Should Have Assigned All Grounds on First Objection.

As shown in the complaint, said Hewitt objected to the confirmation of said receiver's sale and contested the matter even by appeal to the Supreme Court. As we understand the rule of law in such cases, the party must present all of his objections at one time and not try them piecemeal.

"Not only must a party assign a ground for his motion, but he must assign all of the grounds for the relief sought which he may have, and objections known to exist and not raised at the time of the motion may be deemed waived."

14 Ency. Pl. & Pr., 119, citing:
Street v. Street, 113 Ala. 333.
Con. Coal Co. v. Shaffer, 135 Ill. 210.
Hintz v. Craupner, 138 Ill. 158.
N. Y. v. Lyons, 24 How. Pr. 280.
Hinson v. Catoe, 10 S. C. 311.
Bonesteel v. Orbis, 23 Wis. 506.

Appellant may contend that there is nothing on the face of the complaint to show that said Hewitt had knowledge of said fraud. This is true, as there is no allegation as to whether or not he had know-

ledge of such fraud at the time of filing his objection and contesting the validity of the sale, but we earnestly contend that in this class of cases the burden is upon the complaining party to allege and show a court of equity that the new grounds raised were not known at the time of the first objection. It is not a matter of defense, but a question of the sufficiency of the bill in equity. When plaintiff shows on the face of his complaint that he contested the validity of the sale and filed objections thereto, he must, before he can come into a court of equity, allege that the new matters raised were not known at the time he made his first contest. If the complaint on its face did not show that he had objected to the confirmation of the sale on certain grounds at a prior time, then, of course, the defendant would have to plead the former adjudication. But the rule is otherwise where plaintiff alleges the former adjudication and he must then, in order to have any standing in equity, explain why he did not raise the objections sought to be raised in the second suit and must further clear himself by showing that he was not negligent in ascertaining the new matter at the time of his first contest.

The complaint shows that the plaintiff has had his day in court as to contesting the validity of the sale. He should also have alleged that the objections now raised to the confirmation were not urged at the prior contest and furthermore explain why not. A good excuse must appear on the face of the complaint

and if this is lacking a court of equity will not take cognizance of the case.

Allegations of Fraud Insufficient.

The allegations of the conspiracy between Watkins and Cannon are most entirely conclusions (Rec. 18). It is alleged that Watkins wrongfully, unlawfully and illegally conniving and conspiring with Cannon to illegally, wrongfully and unlawfully deprive this plaintiff of his right, bid in the property for the minimum bid. Such allegations are insufficient in an action of this kind, as the bill must set forth the facts of the conspiracy.

In I Black on Judgments, Sec. 369, it is stated:

“And allegations that the judgment was obtained through fraud and ill practices are too vague and general.”

And again, in Sec. 393:

“And it (the bill) must set forth the facts constituting the fraud.”

And again, in Sec. 393:

“Thus, where it is alleged that the adverse party practiced fraud in obtaining judgment, the facts showing such fraud must be stated in a plain and concise manner, as in other cases, mere knowledge of certain facts not being sufficient; the fraudulent acts and proceedings of such party, designed and practiced for the purpose of securing an unfair, unjust judgment, must be clearly shown.”

It would be useless to attempt to cite the many authorities on this question, as the rule is so universal.

Laches in Raising Fraud.

The complaint shows that the sale was had on January 5, 1912; that said Hewitt objected to the confirmation of the sale; the lower court overruled his objections and an appeal was taken to the Supreme Court, which court affirmed the judgment of the lower court on the 15th day of July, 1912. The complaint herein was filed April 30, 1914.

So the complaint shows that a period of about one year and ten months expired before appellant herein sought relief.

One of the most essential elements in an action of this kind is that the plaintiff by proper allegations must exonerate himself and show that his lack of attention in seeking relief in equity was not by reason of his own fault or neglect.

Appellant, in discussing the question of laches, states that the bill is virtually alive with allegations as to the strenuous litigation that plaintiff maintained, and then adds that to hold that the plaintiff is guilty of laches, is almost humorous. It appears to us that appellant entirely misunderstands the application of the principle of laches to the action herein. We do not contend that he was not diligent in prosecuting his remedies in the State Courts, but the question of what he has been doing since and why he did not file his bill in equity herein on the ground of fraud at the sale until two years and four months after the sale is the laches that we are complaining of.

These dates appear upon the face of the complaint and it was incumbent upon the plaintiff to further show upon the face of the complaint a sufficient and satisfactory excuse for such delay. Remaining silent where fraud is the ground for such a length of time, and permitting the property in question to be transferred and conveyed, is unquestionably gross laches, especially when it appears that the property in question is an irrigation system of the magnitude of the one in question where hundreds of thousands of dollars have necessarily been expended in the repair, maintenance and reconstruction of the system. There are numerous cases of this character which might be cited, wherein such a delay under such circumstances would by a court of equity be considered laches unless satisfactorily explained.

Complaint is Subject to Demurrer or Motion to Dismiss if Laches Appear Upon its Face.

The legal principles of laches are well defined. The question first arising is: Must laches be specifically pleaded by defendant? There seems to be no controversy on this point as appellant in his brief admits that if laches appear upon the face of the bill then advantage may be taken thereof by demurrer or motion to dismiss. In 6 Enc. Pl. & Pr. 405, it is stated:

“Where the bill shows such laches upon the part of the plaintiff that a court of equity ought not to give relief the defendant need not interpose a plea or answer, but may demur upon the ground of want of equity apparent on the bill itself.” (Citing many cases.)

In 12 Enc. Pl. & Pr. 829, it is stated:

“According to what is considered the better practice, the defense of laches is one of which it is not necessary to take advantage by the pleadings. If the case as it appears at the hearing is liable to such objection, the court may and usually will remain passive, and refuse relief or decline to entertain the suit.”

In 12 Enc. of Pl. & Pr. 831, we find:

“It is stated that laches is a defense which may be made by plea, answer or demurrer.”

In *Spesby v. Comer*, 76 Ala. 501, it is held:

“If the laches appears on the face of the bill and is unexplained, it is good ground for dismissing the bill on motion for want of equity without answer, demurrer or plea.”

In *Graham v. B., etc., R. Co.*, 118 U. S. 161, it is held:

“The bill was properly dismissed on demurrer on the ground of laches.”

Complaint Must Set Forth Facts Excusing Laches.

The next inquiry is: Must the complainant plead facts showing that he has not been guilty of laches? Here again the law seems to be well settled that the complaint must show how the plaintiff was put on inquiry as to the alleged fraud; by what means it was ascertained, and why discovery, by exercise of ordinary prudence, might not have been made at an earlier date.

The following authorities show that the complaint must set forth the facts on which plaintiff relies as showing that he has not been guilty of laches:

I Black on Judgments, Sec. 393.

23 Cyc., 1042.

12 Enc. Pl. & Pr., 835.

P., etc., Ry. Co. v. K. & H. B. Co., 107 Fed. 786.

Christy v. A., T., etc., Ry. Co., 214 Fed. 1016.

In 12 Enc. Pl. & Pr. 836, it is stated:

“The allegation (excusing laches) must be full, clear, and specific; positive, definite, and distinct; not vague nor uncertain; and no mere generality of statement will meet the requirements.”

And again, on page 837, it is stated:

“The foregoing rules are peculiarly applicable to cases where excuse for laches may be founded upon fraud * * * *. And in such cases it is necessary to allege these facts in avoidance of the bill.”

Again, on page 838, it is stated:

“In seeking to avoid the effect of laches on the ground of fraud the plaintiff must allege in his bill that he was ignorant of it or that it was concealed from him. He must aver that his ignorance was not the result of negligence and was without fault of his own. Complaint should state how he came to be so long ignorant.”

The mere statement in the complaint of the conclusion that he has not been negligent as appears in the complaint herein is insufficient. The mere allegation that plaintiff would have filed this suit long prior hereto had he not been engaged in investigating the facts and the law applicable to this suit, amount to nothing. He must set forth the facts of his investigation of the facts and the law, in order

that the Court may see whether or not he has been diligent. In I Black on Judgmentss, Sec. 393, we find the following:

“He must set forth the *facts* which he relies on as showing such diligence. For instance, a statement that complainant used all the diligence in his power to procure the evidence necessary to defeat the suit at law is not sufficient; the facts in regard to the diligence used must be set out, so that the court can determine whether proper diligence has been exercised.”

In 23 Cyc. 1042, it is stated:

“He must set forth the facts which he relies on as showing such diligence.”

And again, in 23 Cyc., 1011, it is stated:

“He must show the exercise of due diligence to discover his defense.”

MUST ALLEGE TIME OF DISCOVERY OF FRAUD.

Although plaintiff alleges certain fraud, he fails to allege when such fraud was discovered. This is a vital defect. Such an allegation is necessary for two reasons:

1. In order for the court to determine whether or not complainant is guilty of laches.

2. Whether or not the fraud was discovered in time whereby the party would have had an adequate remedy at law by proceeding in the original action to set aside the decree.

The authorities are almost unanimous in holding that in an action of this character the following must be alleged, the fraud, when discovered, how ascer-

tained and why discovery could not have been made sooner by exercise of ordinary prudence. The rule is well stated in *Lataillade v. Orena*, 91 Cal. 566, where the court, in speaking of the discovery of the fraud, holds:

“Must show that he used due diligence to detect it, and must state when any particular discovery was made, what it was, and why it was not made sooner, and will be presumed to have known what with reasonable diligence he might have ascertained concerning the fraud of which he complains.”

The same is held in the following cases:

Truett v. Onderdonk, 120 Cal. 581.

Robertson v. Burrell, 110 Cal. 568.

L. S. C. Co. v. Wood, 113 Cal. 482.

Eldred v. White, 102 Cal. 600.

P., etc., Co. v. K. & H. B. Co., 107 Fed. 782.

Time of discovery of fraud must be alleged:

Hendryx v. Perkins, 114 Fed. 801-811.

Hardt v. Heidmeyer, 152 U. S. 546.

Stearns v. Page, 1 Story 204.

Stearns v. Page, 12 L. ed. 928.

Landsdale v. Smith, 106 U. S. 394.

Hammond v. Hopkins, 143 U. S. 251.

Felix v. Patrick, 145 U. S. 317.

Foster v. Mansfield, 146 U. S. 88.

In 12 Enc. Pl. & Pr., 838, it is stated:

“As to the discovery of the fraud, the bill must show what the discovery was, *and it is a requisite that the time of discovery be distinctly alleged*. It should also appear how the discovery was made. The court should be able to see from the aver-

ments why the discovery was not sooner made by the use of reasonable diligence.”

In *Stearns v. Page*, 1 Story 204, it is held:

“And especially must there be distinct averments of the time when the fraud, mistake, concealment, or misrepresentation was discovered, and how discovered, and what the discovery is; so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made. For, if by such diligence the discovery might have been before made, the bill has no foundation on which it can stand in equity, on account of the laches * * * *. But the bill does not state what particular discoveries have been obtained, or when they were obtained, or by what inquiries, or in what manner, or at what time.”

On appeal in 12 L. ed., 928, it is held:

“And especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made.”

In *Badger v. Badger*, 69 U. S. 87, it is held:

“The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill.”

In *Wood v. Carpenter*, 101 U. S. 135, it is held:

“A general allegation of ignorance at one time and of knowledge at another is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner.”

*If Fraud Discovered in Time Should Have Pursued
His Remedy at Law.*

The time of discovery of the fraud is again material to enable the Court to determine whether or not it was discovered in time for the plaintiff to proceed in the State Court to vacate the decree by motion. In *I Black on Judgments*, Sec. 362, it is stated that the liberal practice of the courts in granting new trials and entertaining motions to vacate their own judgments under statutory enactments on grounds of mistake, inadvertence, surprise or excusable neglect have considerably abridged the province of equity in giving relief. And then the general rule is laid down that equity will not grant relief if the party can be relieved on motion to vacate. Under Sec. 4229, Idaho Revised Codes, a judgment or order can be vacated on grounds of mistake, inadvertence, etc., within six months. So if the plaintiff discovered the fraud alleged in the complaint prior to the six-months period, then he should have proceeded in the district court to vacate the sale, and if he had such knowledge and failed to so proceed, then he lost his remedy at law through his own neglect and equity would grant him no relief.

The following authorities sustain this rule:

I Black on Judgments, §§ 362-387.

Freeman on Judgments, §§ 486-489.

3 Pomeroy's Eq. Juris., § 1361.

Story, Eq. Jur., §§ 894-896.

Bigelow on Estoppel, 151.

I Whitehouse Eq. Prac., § 152.

I Joyce on Irr., § 547.

Brown v. C. of B. V., 95 U. S. 157.

Nogue v. Clapp, 101 U. S. 551.

Parson v. Weis, 77 Pac. 1010 (Cal.)

In *T. P. A. v. Gilbert*, 111 Fed. 269, it is held:

“Where the statutes of a state provide for proceedings in a court of law to set aside a judgment by such court on the ground of fraud * * * such provisions * * * afford a plain and adequate remedy at law which excludes the jurisdiction of equity.”

In *Graham v. B. H. & E. R. Co.*, 14 Fed. 753, it is held:

“A circuit court of the United States cannot revise or set aside a final decree rendered by a state court, which had complete jurisdiction of the parties and subject-matter, upon the ground of fraud in obtaining the decree, where the injured party had an opportunity to apply to the state court to reverse the decree.”

Thus, if the complaint had the proper averments of the time of discovery of the fraud and it appeared therefrom that the complainant had a remedy in the original proceeding which he might have availed himself of, then he would be chargeable with negli-

gence and laches and would be denied relief in his equity action herein.

So in this class of cases it may always be conceded that the judgment sought to be vacated may be unjust, but complainant must still further show that he did not make a discovery in time to avail himself of his remedy at law in the original proceeding.

MERITORIOUS DEFENSE.

Another indispensable element in an action of this kind is that the complaining party must allege that he has a meritorious defense to the original action, otherwise no cause of action exists. In *I Black on Judgments*, Sec. 393, the rule is stated:

“A bill of equity for the vacation of a judgment, or to enjoin its enforcement, should always show that the merits of the controversy are with the complainant. If it fails to allege a good and meritorious defense to the claim on which the judgment was rendered, so that it would be inequitable and unjust to allow the enforcement of the judgment as it stands, the bill states no cause of action and must be dismissed.”

In 23 Cyc., 1031, it is stated:

“Such relief will not be granted unless the complainant shows that he has a good and meritorious defense to the original action.” (Citing numerous cases.)

It is not sufficient to merely allege that one has a meritorious defense or that he has stated the facts to his attorney and is advised that he has a good defense,

but he must specifically set out the facts constituting it, so that the court can conclude whether or not it is a good defense.

I Black on Judgments, Sec. 393.

23 Cyc., 1039.

Christy v. Atkinson, 214 Fed. 1020.

Eldred v. White, 102 Cal., 600.

The complaint herein does not even allege the conclusion that the plaintiff has a meritorious defense. There are no allegations whatever to the effect that plaintiff has a good or meritorious defense to the original action; there are no allegations even attempting to set forth what the facts constituting any meritorious defense that the plaintiff might claim to have in the original action. If plaintiff contends that it can be seen from the allegations in the complaint what his defense will be, we reply that we do not believe that his meritorious defense should be drawn by inferences from other allegations, but should be directly alleged. If it is to be inferred that his defense will be that the receiver's certificates are subsequent in priority to the Hewitt mortgage, then we reply that the complaint shows that this question is *res adjudicata* as the Supreme Court held in 20 Ida. 235, that said Hewitt had had his day in court in the foreclosure proceedings to contest the validity and priority of said certificates, and, therefore, he was bound by the decrees holding that said receiver's certificates were prior to the Hewitt mortgage.

Appellant at least must convince this Court that

the law laid down by the Supreme Court of the State of Idaho in *Dalliba vs. Winschell*, 11 Ida. 364, and *C. T. Co. vs. I. B. Co.* 25 Ida. 755 to the effect that a court of equity has power to appoint a receiver of property and direct him to care for, protect and preserve the property, and decree the charges therefor as prior liens to all other liens, mortgages or encumbrances. Such a power of a court of equity in regard to quasi-public corporations must be recognized.

It is held in *Union Trust Co. vs. I. M. R. Co.* 117 U. S. 434 as follows:

“That the power of a court of equity having charge of railroad property to make necessary repairs does not depend upon the consent of those interested, nor upon prior notice to them.”

The court then goes on to hold subsequent opportunity to be heard as to the propriety of the expenditures and of making them a first lien, is judicially equivalent to prior notice.

Such a holding is directly in point in the present case. While the complaint shows that Hewitt was not a party in the *Idaho Fruit Lands Co.* case, wherein the receivers' certificates were issued, it further shows that subsequently he had an opportunity to contest these certificates in an action in which he was a party, to-wit, the foreclosure suit.

STATUTE OF LIMITATIONS.

Appellant states that the question of the Statute of Limitations was the one that seemed to give the lower court great difficulty, and on which the lower

court sustained defendant's motion to dismiss. We are at a loss to understand where appellant gets this idea. The Judgment of Dismissal (Rec. 46) shows that the court sustained the motion to dismiss on the grounds, (1) that the judgment sought to be avoided were rendered by courts of competent jurisdiction, were conclusive and *res adjudicata*, (2) that a foreclosure of the Hewitt mortgage is barred by Sec. 4052 R. C. of Idaho, (3) that the bill should be dismissed for want of equity, and (4) that the facts stated in the complaint are insufficient to entitle complainant to any relief in a court of equity. How appellant can select one ground, the Statute of Limitations, on a judgment of dismissal setting forth four grounds is hard to understand. Such a suggestion in appellant's brief surely can not be based upon the remarks of Judge Dietrich in sustaining the motion, as he made it quite clear that he was of the opinion that the question of the validity of the foreclosure decree was *res adjudicata*, and that said Hewitt could not again be heard on the same matter, and further that the other allegations of the complaint in regard to fraud, laches, etc., were insufficient to entitle plaintiff to relief. But regardless of the ideas of counsel for appellant, we take it that the judgment of Dismissal itself is the best evidence and will be decisive. Again it is immaterial on what ground the lower court decided the motion to dismiss as its decision will be affirmed by the appellate court if any ground of the motion is sufficient.

The first question on this point to determine is as

to pleading the Statute of Limitations. Can this plea be taken advantage of by demurrer or motion to dismiss? The general rule is, that where it appears upon the face of the complaint that the Statute has run it may be raised by demurrer.

The question is definitely settled in Idaho in the case of *Chemung M. Co. vs. Hanley*, 9 Ida. 787, wherein it is held:

“The plea of the Statute of Limitations may be taken either by demurrer or answer—by demurrer if it clearly appears upon the face of the complaint that the cause of action did not accrue within the statutory time, otherwise by answer.”

The established rule is stated in 13 Enc. Pl. & Pr. 201, as follows:

“Though some doubt formerly existed on the subject, yet it is now and long has been the established general rule that in equity, where it appears on the face of the bill that the bar of the statute has attached, objection may be made and the defense raised by demurrer. If the bill alleges no matters to avoid the bar apparent on its face, it will be considered as stating no cause of action; and it is only by alleging exceptions or grounds of avoidance to defeat the apparent bar that the plaintiff can prevent the bill from being demurrable.”

The next general rule is that the bar of the Statute must be specially pleaded and cannot be raised by general demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action.

Chemung M. Co. vs. Hanley, 9 Ida. 787.

Respondent brought itself within this rule by specially pleading in its motion to dismiss that the action herein is barred by certain provisions of the Idaho Code.

The motion to dismiss herein included the ground that the cause of action herein is barred by Sec. 4054, sub. 4 and by Sec. 4052 of the Revised Codes of Idaho. Said Sec. 4054, providing that an action for relief on the ground of fraud must be brought within three years, can be eliminated. Under said Section the cause of action does not accrue until the discovery of the fraud and there is no allegation in the complaint as to when the fraud was discovered, and besides three years from the sale did not expire before the action herein was commenced.

There is no merit in appellant's contention that Sec. 4051 Idaho Codes governs the commencement of the action herein. Said Section provides: "Within six years: 1. An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States." This section only applies to actions on judgments of sister states or foreign judgments.

As to the commencement of an action upon a written contract Sec. 4052 provides: "Within five years: An action upon any contract, obligation, or liability founded upon an instrument in writing."

The complaint shows that the last note, secured by the Hewitt mortgage, became due July 30, 1908. The complaint herein was filed April 30, 1914. This

makes five years and nine months after the cause of action to foreclose accrued.

There seems to be some misapprehension on this question of the Statute of the Limitations herein. While the respondent raised the question of the action herein being barred by the Statute of Limitations, it will be noticed that the Court in its judgment of dismissal did not state that the action herein on either the fraud feature or want of jurisdiction in entering the foreclosure decree was barred. The court's position being that if the judgments were annulled as prayed for, "such holding would be ineffective and useless for the reason that no further relief of foreclosing the mortgage of the plaintiff, as prayed for herein, could be granted, as an action of foreclosure thereon is barred by the provisions of Sec. 4052 of the Revised Codes of the State of Idaho." (Rec. 47.) So it appears that the lower court considered that it would be useless, even if the matters were not *res adjudicata*, to litigate the validity of the foreclosure decree, for if successful said Hewitt had slept on his rights, if any he had on foreclosure, by waiting until the Statute of Limitations had run against a foreclosure of his mortgage. As heretofore discussed no reason is given in the complaint why the said Hewitt, after the decision on appeal was rendered, September 26th, 1911, sustaining the validity of the foreclosure decree, did not proceed long before April 30th, 1914, the date of the commencement of the action herein, with an action which would involve his foreclosure if the former fore-

closure proceeding was void. In other words, after finishing his appeal in the state court, and having knowledge that the foreclosure decree had been sustained which he claimed at all times was void, he waited about two years and seven months before proceeding at all.

We take it that the wording in the judgment of dismissal on this point was more along the line of the allegations in the complaint being insufficient to excuse the delay of plaintiff and showing want of equity.

The question of the Statute of Limitations being tolled during pendency of an appeal is far from being settled. There seems to be no well defined rule on this point.

Appellant discusses the question of exceptions and recognizes the general rule that courts cannot create exceptions to the statute. And he then proceeds and cites a few cases where a limited class of exceptions have been recognized, to-wit: those arising out of necessity. Under the general rule as quoted by appellant from 19 Ency. of Law 215, we find four cases cited which are also cited in appellant's brief. One case is where the party was prohibited by an act of Congress from bringing suit for the recovery of a certain tax until the claim had been presented, and then appealed to the Commissioner of the Internal Revenue; one was where there was a conspiracy among all of the officials of a city to resign to prevent service of process upon it; one was where a Treaty of Peace of 1783 prevented the operation of a state

statute and the other was where it was held the statute was suspended by reason of war.

Appellant then quotes from the same volume to show that the same rule applies and an exception is recognized without statute where by legal proceedings, such as an appeal, one is prevented from bringing his suit. In examining the cases cited in the note we find that cases cited do not, to any great extent, bear out the text. In fact, there seems to be very few cases that have treated of the specific exception of the statute being tolled by appeals.

The Idaho Codes specifically provide for certain exceptions when the statute will not run. Among the same is found legal proceedings, etc. Sec. 4073 provides that if an action is commenced within the time prescribed therefor, and a judgment therein for plaintiff be reversed on appeal, the plaintiff may commence a new action within one year after the reversal; and in Sec. 4074 it is provided that when the commencement of an action is stayed by an injunction or statutory prohibition the time used in such proceedings is excluded.

Now it appears to us that where a state statute provides for the exceptions and among the exceptions are *certain* legal proceedings, then all other legal proceedings are excluded. There is no section of the Idaho Codes which provides for an exception in the case of appeals.

Appellant had plenty of time to institute the action herein or any other action in relation to fore-

closing his mortgage, if he thought he had a right to again foreclose same, long before April 30th, 1914, the date of the institution of the suit herein and after the conclusion of his litigation on appeal on September 26th, 1911, a period of two years and seven months. If he had brought his action ten months before the action herein, the statute would not have run on the institution of an action to foreclose his mortgage, if he had any right of action to a second foreclosure.

ANSWERING AUTHORITIES CITED BY APPELLANT.

On Point Judgment is Void as to One Not a Party.

The case of Metropolitan Tr. Co. vs. L. C. Elec. Co., 100 Fed. 397, is cited on the point that a judgment is void as to one who is not made a party to the action and is of no effect whatever. In that case a receiver was appointed who issued certificates, as liens against the property, and later an action was brought in the United States Court to determine the priority of all liens. It was held that those not parties to the first suit wherein the receiver's certificates were issued, were not bound by the order making them prior liens.

The appellant likens this case to the case at bar in that he was not a party in the Idaho Fruit Lands Company case wherein the receiver's certificates were issued for the care and preservation of the property, and that, therefore, he can now raise the question in an action in the federal court and have

the judgment of the state court vacated. It is readily seen that said case is not, as stated by appellant, on all fours with the one at bar. It would be if we eliminate the foreclosure action in the state court. Appellant entirely overlooks the fact that he brought a foreclosure suit in the state court wherein the receiver became a party, and he was given an opportunity to contest the priority of the receiver's certificates. In other words, had his day in court on this matter as stated by the Supreme Court of Idaho. If it was not for his first foreclosure suit in the state court in which these matters were drawn in issue and presented to the Supreme Court on appeal, we would not be here contending that the receiver's certificates, in an action wherein the appellant was not a party, could be held prior to his mortgage.

In the Metropolitan case the court held that if the action in the federal court was for the same purpose as in the state court, and between the same parties, it would not take jurisdiction. That is the situation of appellant exactly. His action now is to set aside a judgment of a state court and have another foreclosure; the identical action that he had in the state court and between the same parties or their privies.

Appellant also cites *Union Tr. Co. vs. Ill. M. Ry. Co.* 117 U. S. 434 as sustaining the same principle. We have heretofore cited this case in our favor. The court there held it was not necessary in actions involving receivership of railroads and issuing of receiver's certificates to have all parties before it at the time the receiver's certificates were issued in or-

der to make them prior liens. It was sufficient if they had an opportunity at some later day to contest the certificates and their priority. Such a holding places this case directly in our favor, as appellant had an opportunity to contest the certificates and their priority in his foreclosure suit, although he may not have been made a party in the Idaho Fruit Lands Co. suit.

On Point Judgment Not Based Upon Issues Raised in Pleadings Is Void.

The case of Munday vs. Vail, 34 N. J. L. 418, is cited on the point that a judgment based upon issues not raised by the pleadings is void. The point in that case was whether or not a judgment was void which was entered by a state court to the effect a certain trust deed was void against *everybody* when the pleadings were to the effect that it was void as against a certain judgment only. The court held that such judgment was void from the facts of the record showing that such an issue had not been made. In other words, want of jurisdiction on this point appeared upon the face of the record.

We desire to call this Court's attention to the fact that said action was not for the purpose of vacating said void judgment of the state court, but was an action to recover the property. Therefore, as stated in the decision, a collateral attack was made. Suppose, for instance, the action in the federal court had been a direct attack to *vacate* the judgment of the state court, what would the federal court have done with such an action? From the great weight of authority,

especially the federal authorities, the court would have refused relief in equity for the reason that the invalidity of the judgment appeared upon the face of the record and could, therefore, be disregarded or taken advantage of by motion or appeal in the original action. This is exactly what was held in the leading case on this question, *Little Rock J. Ry. vs. Burke*, 66 Fed. 83. In that case the court refused to grant equitable relief to vacate the judgment of the state court in the ground that the judgment was void as appeared from the face of the record, and therefore, the party had an adequate remedy at law, or he could attack the same in a collateral suit, as ejectment. In discussing the federal cases bearing upon this point, the Court in *Nat. Sur. Co. vs. State Bank*, 120 Fed. 599, commenting on the *Burke* case, states that relief was denied because "the facts stated in the case appeared on the face of the record in the state court and were as available in ejectment as in equity." This is the real point to be borne in mind at all times in passing upon the question of vacating a judgment of a state court where the ground is want of jurisdiction. If the judgment is void on the face of the record, then it is subject to collateral attack at any time and therefore, a court of equity will not proceed to vacate the judgment. It is only where the judgment appears valid upon its face, and it takes extrinsic evidence to show its invalidity, thus raising new issues, that a court of equity will grant relief.

The conclusion must be that the ruling on the question of "want of jurisdiction appearing upon the

face of the record" is exactly opposite in an equitable action to vacate the judgment of a state court on this ground, to that in an action of a collateral attack, to-wit:

1. That in an equitable action to vacate, want of jurisdiction appearing upon the face of the record is not a sufficient ground.

2. In an action wherein a collateral attack is made, want of jurisdiction appearing upon the face of the record is a sufficient and necessary ground.

So why does appellant cite cases of collateral attack as being applicable in his equitable action herein to vacate the judgment of the state court on the ground of want of jurisdiction appearing upon the face of the record? There are many United States cases, as heretofore cited, fully establishing such a rule. So we do not need to look to the principles laid down as to the conclusiveness of judgments on collateral attacks.

The case of *Reynolds vs. Stockton*, 140 U. S. 254, is also cited with the *Munday* case. In fact, the Supreme Court on one feature of the case quotes extensively from the *Munday* case. We desire to call the Court's attention to the fact that appellant is again citing a case of collateral attack, as the questions arising in the *Reynolds* case were upon a collateral attack to a judgment of a sister state. Here again, the rule is laid down that where it is shown that want of jurisdiction appears upon the face of the record, the judgment can be attacked collaterally.

The same analysis which we have heretofore made of the Munday case would therefore apply. We further call the Court's attention to the fact that in the Reynolds case there was the double aspect running through the entire case, to-wit, that the judgment was not responsive to the issues presented by the pleadings, *and was rendered in the absence of the defendant*. It was held that where the complaint states one cause of action and defendant appears, that a subsequent judgment in the absence of the defendant upon another and different cause of action than that stated in the complaint is void. A further statement of the case shows that the receiver had been discharged prior to the entry of the judgment complained of. Such a condition of affairs would undoubtedly make the judgment subject to collateral attack.

The case of Corwithe vs. Griffing, 21 Barb. 2, is exactly in accord with our contention. It was an action to vacate a judgment of a state court on ground of fraud and also on the ground of want of jurisdiction. The court held that the judgment was not void on the face of the record and that it was "necessary to resort to exterior evidence to show it," therefore, a court of equity would take jurisdiction. This raised new issues foreign to the action in the state court and would warrant equitable action. It required more than a review of the record and proof in the original action.

The case of West vs. Shurtliff, 79 Pac. 180, is not in point for the reason that it was an action to vacate

a judgment on the ground that a personal judgment had been entered through *mistake*.

A quotation on the rule is made from 23 Cyc. 816. This quotation shows that the issues may not have been raised by the pleadings, but may have been brought before the court by "any statement or claim of the parties." So it does not necessarily follow that an issue not raised by the pleadings is void as it may have been properly placed in issue and contested during the trial. Again the quotation made is under the heading of "Judgments—Conformity to Pleadings" and is not found in the chapter treating of actions to vacate judgments on the ground the court exceeded its jurisdiction. Most of the cases cited under the quotation are where appeals were taken from the original action and upon a review of both the pleadings and the transcript of the evidence, and the court held the judgment was not supported by the pleadings and proof and therefore void, or were cases where collateral attacks were made upon the judgment and it was held that the record showed on its face that the court was without jurisdiction and therefore void.

Therefore, such quotations and authorities cited thereunder, as heretofore shown in our brief, do not support the contention of appellant that a court of equity will grant relief for such alleged errors.

On Point That Affirmance of Void Judgment by Supreme Court Has no Effect.

On page 51 of appellant's brief a quotation is made from 23 Cyc. 698 to the effect that a void judgment

cannot be made valid by the taking of an appeal from it or even by an affirmance on appeal. Such a statement of law is rather startling without any exception being made. The first thought which occurs is: Suppose the validity of the judgment was attacked on the appeal and the Supreme Court holds the judgment is valid? One would naturally think that then the party had had his day in court and he would be bound by such decision.

And such is the law, and if appellant in making said quotation from Cyc. had finished the sentence, it would so appear. The quotation stops at a comma in the text and immediately following same are the words:

“If the affirmance is on grounds not affecting the question of validity.”

The completion of the quotation leaves the appellant without any argument whatever to sustain his position.

On Point Void Decree Will Not Support Sale.

There is no dispute on such a principle of law, but appellant must first prove the foreclosure decree is void. We have heretofore discussed the question of the validity of the foreclosure decree and that the errors appearing are not sufficient to warrant a court of equity to interfere, and further that the issues raised on this point are *res adjudicata*.

Appellant also contends that the action of the Supreme Court in overruling objections to sale and affirming the confirmation thereof adds nothing. In

reply, we will state that the Supreme Court having held on a former appeal that the foreclosure decree was valid where the same objections to its invalidity were raised as are raised in the complaint herein, then the sale is based on a valid decree, and therefore, appellant's position is untenable.

On Point Whether Court of Equity Can Grant Relief Herein.

On page 53, appellant's theory is very apparent. He contends the foreclosure decree is void and he then contends that he can keep on attacking its validity until he finds some court which will declare it void. He states that he had concurrent remedies in that "he can either appeal and take his chances on having the appellate court reverse the judgment or he can bring an independent suit in equity to set it aside and restrain its enforcement." Such a statement may be correct, but when he follows the same with the statement that he could pursue a path of safety by first resorting to one of the remedies and raising the question of the validity of the decree, and if then unsuccessful, could pursue the other remedy on the same grounds, he over-reaches himself in his enthusiasm, and exposes the frailty of the basis upon which he stands.

23 Cyc. 987, is quoted to the effect that a federal court can vacate a judgment of a state court on the ground that it was procured by fraud, *or was void for want of jurisdiction*. In the opening of our brief we stated the rule as now recognized by the federal court. We have heretofore discussed fully the ques-

tion of fraud alleged in the bill and also the power of the federal court to vacate on the ground of want of jurisdiction. And we submit that each and every case which appellant cites bears out the positions for which we contend. Appellant throughout his brief up to discussing this point insisted that the decree was void for the reason that it was not warranted by the pleadings; this invalidity, according to his theory, would appear upon the face of the record. We cite many cases showing that the invalidity of the judgment, if appearing upon the face of the record, is not sufficient ground to warrant the intervention of a court of equity. And then on page 54 we find the appellant, in discussing the power of equity to enjoin where a judgment is void, admitting this proposition as follows:

“And especially so if a judgment is regular upon its face and does not disclose the grounds of its invalidity.”

Although appellant states that if the “judgment” is regular on its face, appellant no doubt means if the “record” is regular on its face. It appears then that we are arriving at a common ground, to-wit: that if it requires a trial of “new facts” on “new issues” such as fraud in the obtaining of the judgment or false affidavits in obtaining service of the person, where the record shows the defendant was served, then a court of equity will intervene.

There are five cases, three of which are discussed in appellant’s brief, cited in the note to the quotation from 23 Cyc. 987. One was on the ground of fraud

and the other four cases, *Howard vs. DeCordova*, 177 U. S. 609, *N. P. R. Co. vs. Kurtzman*, 82 Fed. 241, *McNeil vs. McNeil*, 78 Fed. 834; *Davenport vs. Moore*, 74 Fed. 945, are cases where courts of equity were asked to intervene where the record showed on its face that the court had jurisdiction of the defendants, when in fact said defendants had never been served. Here was raised the question of "want of jurisdiction" which must have been determined by facts extrinsic to the trials in the original action. There is no question that in such cases it is well established that federal courts will intervene on their equity side. There are several other federal cases besides the above four cases so holding, and we wish it clearly understood that we are not opposing the principle upon which the court acts in this class of cases, where the record is false as to the service upon the defendant and he had no knowledge of the action or opportunity to defend.

And again there may be cases where a court of equity would intervene upon a showing that the plaintiff was seeking to enforce a judgment in an action wherein the record showed that the service by publication was defective and failed to recite jurisdictional facts in regard to the publication but these cases are few indeed.

The case of *Arrowsmith vs. Gleason*, 129 U. S. 86, is also cited as authority for a court of equity to vacate a judicial sale on the ground of fraud. This case follows the other United States cases on this point and holds that a court of equity would give relief where a

judgment was obtained through fraud which was extrinsic to the issues in the original action. The sale in question in this case was one by the probate court and was procured through fraud, and the orders also entered therein were obtained fraudulently.

On Point of Unauthorized Acts of Bradley.

The case of *Cooper vs. Newell*, 173 U. S. 555, is cited for the purpose of showing that the allegations of the complaint herein, that Bradley attended the sale and wrongfully and fraudulently represented himself to be the agent of Hewitt and that he had authority to bid for him at the sale, were such as to constitute an unauthorized appearance which would avoid the sale.

The *Cooper-Newell* case was one where the defendant had no knowledge of the action whatever, but an attorney, without any authority whatever, appeared for the defendant. We are unable to grasp the similarity between these two cases. It is an entirely different thing where an attorney appears in an action without any authority, and judgment is entered against the defendant, and where an individual merely appears at a sale and states that he represents a certain party and that he has authority to bid for him. There are no allegations in the complaint showing that Bradley's acts in making these statements interfered with the sale in any way. It does not appear that such acts had any effect upon the sale or that there was not a fair sale by reason of his acts. Again there are no allegations that the now owners of the canal system, or that the Receiver

or purchaser at the sale were instrumental in having Mr. Bradley attend the sale and make such representations. So far as the complaint shows he did not come other than at his own desire and therefore any acts of his could not affect the validity of the sale.

Appellant refers to the allegations in the complaint that the property was worth fully five hundred thousand dollars, and that through the design of others it was struck off to the purchaser for \$56,546.79. It is then suggested that inadequacy of price is in general not sufficient to set aside a judicial sale unless it raises a presumption of fraud or shocks the conscience of the court. Here we have appellant asking this Court to take into consideration the inadequacy of price and the minimum bid. These matters were fully raised upon the hearing of the writ of prohibition and upon objection to the confirmation of the sale. They were presented to courts which had jurisdiction of the matter and were passed upon. The decisions of the Supreme Court referred to in the complaint show fully how these matters were raised and adjudicated on appeal. The question of the alleged injustice and illegal discrimination against said Hewitt, by the court in placing the minimum bid at only \$56,546.79 and covering receiver's certificates and some other liens, was all raised on the writ of prohibition, and the question of a grossly inadequate price was raised upon the objections to the confirmation of the sale and upon an appeal therefrom. In passing upon the claim of inadequate consideration, the Supreme Court, in 22 Ida. 335, states: "And

while it is argued that the sale was for an adequate consideration, there is nothing in the record to substantiate that contention." Said decision shows that said Hewitt was very active in looking after his interests, and further that the Receiver and his attorneys did everything in their power to give said Hewitt time to investigate the value of the system before the day of the sale. The sale was continued twice, as shown by said decision, at the request of said Hewitt, and when a day was fixed agreeable to him, he failed to appear at the sale and make any bid whatever. In fact, the attorneys representing him notified the Receiver and his attorneys, prior to the bid, that the system was not worth the minimum bid of fifty-six thousand dollars and that he would not pay that much cash for it. After the sale, Mr. Hewitt was given the first opportunity to take over the system upon the bid of the purchaser Watkins, at the figure bid. The decision of the Supreme Court, 22 Ida. 335, shows that these negotiations were carried on between said Watkins and the representatives of said Hewitt; and further on page 332 it is shown that said Hewitt, through his agent, resumed negotiations after the sale and that said Hewitt would not advance the amount bid by Watkins and take over the system; it then further appears on page 333 that after said Hewitt would not make good the minimum bid, that it was then the parties interested sought to enlist the aid of others and interested James H. Brady, who advanced the necessary money. So these matters were harped upon and argued time and again to the Idaho courts and it was found that there was nothing

whatever in their complaints, and that said Hewitt had had every opportunity to take over the property at the minimum bid, and there can be but one conclusion that the old broken down system which had been in a receiver's hands for three years, was not worth it. And we might say in passing that there might have been a deplorable condition in that community if James H. Brady, who is United States Senator from the State of Idaho, had not been public spirited enough to come to the rescue of the users of water under said system. And further under our charge of laches we can fairly argue that a canal system of such extensions, as is shown in the description in the mortgage, would necessarily take hundreds of thousands of dollars, which it has, for repairs, maintenance, reconstruction, etc., which has been almost entirely borne by Senator Brady, and that this Court, having such a system in issue, cannot help but hold that said Hewitt is guilty of laches when he waited two years and four months before commencing the action herein after the said sale.

We submit that the bill of complaint herein is legally deficient on the many points herein presented, and that the same is wanting in equity and is insufficient to entitle the complainant to any relief in a court of equity, and that the decision of the district court should be affirmed.

Respectfully submitted,

L. L. SULLIVAN,

W. E. SULLIVAN,

Counsel for Defendant in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

WONG BACK SUE,

Appellant,

vs.

CHARLES T. CONNELL, as Immigration Inspector
in Charge,

Appellee.

In the Matter of the Petition of WONG BACK SUE
for a Writ of Habeas Corpus.

Transcript of Record.

Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.

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ALBERT SCHOONOVER, Esq., U. S Attorney, and MANSEL G. GALLAHER, Esq., Assistant U. S. Attorney, Los Angeles, California. [3*]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

In the Matter of WONG BACK SUE on Habeas Corpus.

Citation on Appeal.

United States of America,—ss.

The President of the United States, to Hon. CHARLES T. CONNELL, as Immigration Inspector in Charge, and to his Attorney, ALBERT SCHOONOVER, United States Attorney in and for the Southern District of California, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an

*Page-number appearing at foot of page of original certified Record.

order allowing an appeal of record in the clerk's office of the United States District Court for the Southern District of California, Southern Division, wherein Wong Back Sue is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Hon. BENJAMIN F. BLEDSOE,
United States District Judge for the said District,
this 24th day of Feby., 1915.

BENJAMIN F. BLEDSOE,
United States District Judge.

Service of the foregoing citation acknowledged
and copy thereof received this 24th day of February,
1915.

M. G. GALLAHER,
Asst. U. S. Atty.
CHAS. T. CONELL,
Inspr. in Charge. [4]

[Endorsed]: No. 927—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. In the Matter of Wong Back Sue on Habeas Corpus. Citation on Appeal. Filed Feb. 24, 1915, at 40 min. past 4 o'clock, P. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. [5]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

No. 927—CRIM.

In the Matter of the Petition of WONG BACK SUE,
for a Writ of Habeas Corpus. [6]

In the District Court of the United States, in and for the Southern District, Southern Division of California.

In the Matter of WONG BACK SUE on Habeas Corpus.

Petition for Writ.

To the Honorable, BENJAMIN F. BLEDSOE,
United States District Judge in and for said District:

The petition of Wong Back Sue respectfully shows: That said Wong Back Sue is unlawfully imprisoned, confined, detained and restrained of his liberty by C. T. Connell, Immigration Inspector for said District, in the County Jail in the city of Los Angeles, county of Los Angeles, State of California; that the said imprisonment, detention, confinement and restraint, are unlawful in this:

That pursuant to the application of Geo. W. Webb, Immigration Inspector, at Calexico, California, dated January 6th, 1915, charging that the petitioner herein entered the United States on or about December 19th, 1914, without inspection as

contemplated by the Immigration Act, and that said entry was affected from Mexico, near Calexico, California, in violation of Section 36, of the said Immigration Act, and that said petitioner was within the purview of section 21 of the Immigration Act, because found in the United States, having entered in violation of Section 7, Chinese Exclusion Act of September 13, 1888, and being a Chinese laborer and failed to produce to the proper officers a return certificate; a warrant dated January 23d, 1915, for the arrest of the petitioner was issued by the Assitant Secretary of Labor, Charles B. Franklin, Inspector, purporting to charge as follows:

(a) That the petitioner entered the United States in violation of Section 7, Chinese Exclusion Act, of September 13th, 1888, [7] and (b) that he was a Chinese laborer who failed to produce to the proper officer a return certificate required by said section, and (c) that he entered in violation of Section 36 of said act, rule 13.

That thereafter, to wit, on or about February 15, 1915, a purported warrant of deportation purporting to have been issued and signed by W. B. Wilson, Secretary of Labor of the United States, was received by said C. T. Connell, Immigration Inspector at Los Angeles, California, ordering the deportation of this petitioner to China upon the alleged grounds (a) that the petitioner entered the United States, landing near Calexico, California, on or about December 18th, 1914, and (b) that the petitioner was subject to deportation under section 21 of the Immigration act, approved February 20, 1907, in that he

entered the United States in violation of Section 7, Chinese Exclusion Act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section, and (c) that the petitioner was found unlawfully within the United States in violation of the act of Congress of February 20, 1907, amended March 26, 1910, and, (d) that petitioner entered the United States in violation of Section 36, of said act, rule 13.

That pursuant to said warrants, the petitioner is now unlawfully held and detained in the County Jail of Los Angeles County, as aforesaid.

Petitioner alleges that the statements, affidavits, evidence and other sources of information upon which said arrest of petitioner and the said warrant upon which he was ordered deported *was* wholly insufficient to justify the issuing of said warrant of [8] deportation; that the purported facts upon which the said Secretary of Labor purported to act were wholly insufficient as a basis for the arrest and detention of said petitioner, or the issuing of said warrant or warrants, and hereinbefore referred to; that no facts were at any time heard or proven upon which there was authority to issue said warrant of arrest or deportation. That said warrant of deportation was issued without any sufficient showing that petitioner was in the deportable class.

II.

That the petitioner has been a resident of the United States for the period of 25 years next preceding this date, and that heretofore, to wit, on or

about the 31st day of March, 1894, there was issued to him a certificate of residence in the United States, and that ever since said time, the petitioner has been a continuous resident of the United States, and that he has not departed therefrom since said certificate of residence was issued to him; that he is entitled to his liberty from said confinement under the Constitution and laws of the United States; that by said imprisonment, he has been deprived and is now deprived of his liberty without the due process of law, to which he is entitled; that by said unlawful imprisonment, he has been and is now deprived of the protection of the laws of the United States and the liberties guaranteed persons of like class, that the said arrest and detention of petitioner and the said order of deportation of petitioner, are without authority of law in that there were no facts ever at any time shown to the authorities purporting to issue said warrant or warrants, justifying their issuance under any law or treaty of the United States.

III.

That the portion of said warrant of deportation ordering this petitioner to be deported to China is void, and that if the matters and things upon which said warrant of deportation was issued [9] were true, all of which this petitioner denies, this petitioner should not be deported to China, but to Mexico.

WHEREFORE, the petitioner prays that Writ of Habeas Corpus directed to the said *E. T. Connell*, Immigration Inspector, issue commanding him, or any person acting under his authority in the prem-

ises to produce the body of the said petitioner before your Honor at a time and place to be herein specified to the end that the cause of his deportation may be inquired into, and that he may be restored to his liberty, and that pending such hearing no further action be taken toward the deportation of this person, and that your petitioner be admitted to *said* bail as is reasonable.

(Signed) (Chinese Characters.)

State of California,

County of Los Angeles,—ss.

Wong Back Sue, being first duly sworn, deposes and says that he is the petitioner named in the foregoing petition; that he has read the petition, and knows the contents thereof, and that the same are true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters, he believes them to be true.

(Signed) (Chinese Characters.)

Subscribed and sworn to before me, this 18th day of February, 1915.

[Seal]

RALPH J. DOMINGUEZ,

Notary Public in and for the County of Los Angeles,
State of California.

W. W. HYAMS,

THOMAS A. SANSON,

DUKE STONE,

Attorneys for Petitioner.

[Endorsed]: No. 927—Crim. In the District Court of the United States, Southern District of California, Southern Division. In [10] the Matter of Wong

Back Sue. Petition for Writ of Habeas Corpus. Filed Feb. 18, 1915, at 45 min. past 10 o'clock, A. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. W. W. Hyams, Thomas A. Sanson, Duke Stone, Attorneys for Petitioner, 1039 Merchants Nat'l. Bk. Bldg., Los Angeles, California. [11]

[Order Denying Application for a Writ of Habeas Corpus, etc.]

At a stated term, to wit, the January Term, A. D. 1915, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the courtroom thereof, in the city of Los Angeles, on Tuesday, the twenty-third day of February, in the year of our Lord, one thousand nine hundred and fifteen. Present: The Honorable BENJAMIN F. BLEDSOE, District Judge.

No. 927—CRIM. S. D.

In the Matter of the Application of WONG BACK SUE, for a Writ of Habeas Corpus.

This cause having heretofore been presented to the Court for its consideration and decision on an application for the issuance of a writ of habeas corpus, said application being accompanied by a transcript of a hearing before the immigration officials of the Government; and said cause now coming on upon said application; Mansel E. Gallaher, Esq., Assistant U. S. Attorney, appearing as counsel for respondents; Duke Stone, Esq., appearing as counsel

for petitioner; now, upon further presentation of this cause, it is by the Court ordered that petitioner's said application for a writ of habeas corpus be, and the same hereby is denied, to which ruling of the Court, on motion of petitioner and by order of the Court, exceptions are hereby noted herein on behalf of said petitioner; and it is further ordered, on motion of Duke Stone, Esq., of counsel for petitioner, that said petitioner be, and hereby is granted until Wednesday, the 24th day of February, 1915, at 10 o'clock, A. M., within which to prepare and present petition for appeal herein, and take such other steps in the matter of an appeal as he may be advised. [12]

Bureau of Immigration,
Form 8D.

Warrant—Deportation of Alien.

UNITED STATES OF AMERICA.

U. S. Department of Labor.

WASHINGTON.

El Paso No. 5025/685.

No. 53944/11.

Inc. 3845.

To SAMUEL W. BACKUS, Commissioner of Immigration, Angel Island Station,
San Francisco, California.

WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector Charles B. Franklin, held at Yuma, Arizona, I have become satisfied that the alien

WONG BACK SUE,
who landed at or near the port of Calexico, Califor-

nia, on or about the 18th day of December, 1914, is subject to be returned to the country whence he came, under section 21 of the Immigration Act approved February 20, 1907, being subject to deportation under the provisions of a law of the United States, to wit, The Chinese Exclusion laws, in that:

He re-entered the United States in violation of section 7, Chinese Exclusion Act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section;

And, WHEREAS, from proofs submitted to me, after due hearing before Immigration Inspector Charles B. Franklin, held at Yuma, Arizona, I have become satisfied that the said alien has been found in the United States in violation of the act of Congress approved February 20, 1907, amended by the act approved March 26, 1910, in that: [13]

He entered in violation of section thirty-six of said act (rule 13),

I, W. B. WILSON, Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, does hereby command you to return the said alien to China, the country whence he came, at the expense of the appropriation "Expenses of Regulating Immigration, 1915." You are directed to purchase steerage transportation for the alien via the Pacific Mail Steamship Company, from San Francisco, Cal., to China, payable from the above-named appropriation.

For so doing, this shall be your sufficient warrant.

WITNESS my hand and seal this 10th day of February, 1915.

(Signed) W. B. WILSON,
Secretary of Labor.

RHH. [14]

[Hearing Before Immigrant Inspector, January 24,
1915.]

WARRANT HEARING.

U. S. DEPARTMENT OF LABOR.
IMMIGRATION SERVICE, MEXICAN
BORDER DISTRICT.

File No. 4027/4.

January 24, 1915.

Time: 3:15 P. M.

In the Matter of WONG BACK SUE, arrested pursuant to Departmental telegraphic warrant, dated Jan. 23, 1915, No. —, charged with: Entering the United States without inspection, in violation of Section 36 of the Immigration Act, and, further, that he re-entered the United States in violation of Section 7, Chinese Exclusion Act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section, and, brings the alien within the purview of Section 21 of the Immigration Act, and subject to deportation thereunder.

Hearing had before Immigrant Inspector Charles B. Franklin, in the office of Sheriff, Yuma Co., Ariz.,

at Yuma, Arizona, on this 24th day of January, 1915.
Present: CHARLES B. FRANKLIN, Examining
Officer.

FONG SHUE (Sworn), Interpreter.

CHARLES B. FRANKLIN,

Stenographer,

Secretary.

Warrant presented, read, and explained to the alien, who is advised of the nature of the proceedings and that he may be released from custody during the pendency of the case upon furnishing a satisfactory bond in the sum of twenty-five hundred dollars (\$2,500.00). [15]

Alien in good health.

Alien, being first duly sworn, testified as follows:

[Testimony of Wong Back Sue.]

My name is Wong Back Sue; I am 66 years of age; a subject of China; and of the Chinese race; embarked for the United States from China; and landed at the port of San Francisco, California, on TG—7—6—30, #——; my destination at that time being San Francisco, California. The names and addresses of the members of my family in the United States and abroad are as follows:

No relatives in the United States.

Wife, Ju Hoy, and son, Wing Fat, residing at Wong Let village, H. P. district, China. No others.

Q. What occupation do you follow?

A. Laborer; cook by trade.

Q. Have you a certificate of residence entitling you to be and remain in the United States as a Chinese laborer?

(Testimony of Wong Back Sue.)

A. Yes, I gave it to you. (Refers to certificate of residence No. 95,243, issued in the name of Wong Back Sue, by O. M. Wellburn, Collector for the First California District, per Samuel Prager, Deputy, at Los Angeles, Cal., on March 31, 1894, to a laborer, occupation cook, residence, 761 Alameda Street, Los Angeles, Cal.; height 5' 3 $\frac{3}{4}$ "; age 45; physical marks, scar left side of neck; scar left side of top of head; scar right side of neck.)

Q. Have you made any trips to China since you received this certificate of residence?

A. No, I have never been back there since I first came to the United States.

Q. Have you made any trips to Mexico since coming to the United States?

A. No, I have never been to Mexico, but I took a trip to El [16] Paso, Texas, in the early part of 1906.

Q. Were you not in Mexico, working as cook on the Loftus ranch in February or in the early part of 1914?

A. No, I never worked there, don't know that place.

Q. Were you ever in Mexicali, Mexico?

A. No, I never was in Mexico.

Q. Do you know a Chinaman in Mexicali by the name of George Henry?

A. No, I never heard that name before.

Q. Did you not live in Mexicali, Mexico, about three months ago? A. No, I did not.

Q. Do you know a Chinese merchant in Mexicali,

(Testimony of Wong Back Sue.)

Mexico, by the name of Jim Lee?

A. No, I don't know him.

Q. Were you ever in El Centro, California?

A. No. I was never there.

Q. Where were you during the month of December last year, 1914?

A. I was living in Los Angeles.

Q. *Was* you in Los Angeles, all of the time from the first to the 19th of December of 1914?

A. Yes, all the time in December.

Q. Did you not come from El Centro, Cal., to Los Angeles, Cal., on the train, on the 19th of last December, 1914?

A. No, I was in Los Angeles, at that time.

Q. I will now show you the train inspection card, showing that you were inspected by Inspector Palmer, on train S. P. #37, from El Centro, Cal., to Los Angeles, Cal., at El Centro, Cal., on December 19, 1914, and also the card of Inspector Frank G. Ellis, on the same date and train at Indio, Cal., while you were en route to Los Angeles, Cal., #—. (Witness is shown cards above described, which are attached to the application [17] for warrant of arrest in this case, same being referred to as a part of the record herein, was read to the alien.)

Q. What have you to say to this statement?

A. I never took a train from El Centro to Los Angeles, Cal., and that is all a mistake.

Q. Do you mean to say that you deny the evidence shown by the official records, showing that you were inspected on train No. 37, from El Centro, Cal., to

(Testimony of Wong Back Sue.)

Los Angeles, on December 19, 1914?

A. It is a mistake; I was in Los Angeles, Cal., all the time.

Q. I will now read you four statements of four persons who swear on oath that they saw you in Mexico, during part of the year 1913 and 1914, in Mexicali, and on the Loftus and Davis ranches, south and west of Mexicali.

(Statements of D. L. Crane, George Henry (Chinese), G. L. Hockenberry, and Jim Lee (Chinese), which are attached to the application for warrant of arrest in this case, and are referred to as a part of the record herein, were read to the alien, comprising exhibits "C," "D," "E" and "F.")

Q. What have you to say to these statements?

A. I don't know any of these men, and I never worked on a ranch, nor lived in Mexicali, Mexico, never was in Mexico, and they don't tell the truth.

Q. Whose photograph is this I have in my hand? (Showing alien photo of himself, which is attached to exhibit "B" hereof, certification of Inspector Geo. W. Webb, that said photograph of Wong Back Sue was shown to the four witnesses named above, who positively identified him as having been seen by them in Mexico, and which certificate with photos attached being attached to the application for warrant of arrest in this case, and is referred to as a part of the record herein.)

A. That is my photograph.

Q. Did you not make a statement to me on January 16th last? [18] A. Yes.

(Testimony of Wong Back Sue.)

Q. Did all of the statements made by you at that time contain the truth?

A. Yes, as far as I remember.

Q. Then you are not sure that you told me the truth at that time?

A. Yes, but I am an old man and sometimes I forget just how long and at what time I was at certain places.

Q. Were you ever in Calexico, California?

A. No, I was never there.

Q. How long ago did you leave Yuma last time to go to Los Angeles, California?

A. I think about five years ago next July.

Q. The first time I asked you this question, you said that you left Yuma for Los Angeles, about three years ago, that was on January 16, 1915, and later on in the same examination you stated that you were in Los Angeles four years after leaving Yuma at that time.

A. Yes, I know but I forgot, and now I think it was five years next July that I went to Los Angeles, Cal.

Q. Where did you work in Los Angeles at the time you arrived there in July that time?

A. I worked in a Chinese restaurant as cook, name of restaurant, "American Restaurant," on Alameda Street, I forget the number.

Q. At what time and how long did you work in that restaurant?

A. About two months, and, then my leg hurt me so that I quit, and did not work at all after that,

(Testimony of Wong Back Sue.)

until I came to Yuma on the 8th of this month.

Q. Did you not tell me in your previous statement that you had to leave Yuma to go to Los Angeles to have your leg treated, as blood-poisoning had set in, and that you did not work at any time while in Los Angeles at that time? [19]

A. Yes, I work for two months in the "American Restaurant," and then I lay off as my leg got too bad, so Dr. Wong treat me but I could not work any more.

Q. Then you did not tell me the truth when you said you had blood-poisoning when you first went to Los Angeles and *was* treated by Dr. Wong for the same during the first two months you were there?

A. Yes, I had a little blood-poisoning and was treated when I first went there, and all the time I was there for about ten months, but I was able to work for about two months, and then it got worse and I had to stop working.

Q. Have you a scar on your leg where you were hurt? A. Yes, exhibits large scar on right shin.

Q. Did Dr. Wong treat your leg for ten months?

A. No, only about two months.

Q. If it will be five years next July since you left Yuma to go to Los Angeles, then you must have been in Los Angeles four and one half years, or thereabouts. A. Yes, I think so.

Q. Then you went to Los Angeles in July of 1910.

A. Yes, that's right.

Q. In your last statement did you not tell me that you went to Los Angeles from Yuma in July, 1912?

(Testimony of Wong Back Sue.)

A. Maybe I did, but I forget, as I now think I went there in 1910.

Q. You say that you worked for two months in the "American Restaurant"; did you live there during that time also?

A. I lived at the Quong Yick store; no, I mean Haw Lun Fong, for over a year when I first went to Los Angeles.

Q. And after that where did you live?

A. At Mo Wun Fong, about 8 months; I forget street and number.

Q. After that where did you go to live?

A. I go to Wong Yut, at the Quong Yick store in Los Angeles [20] Street; I think I live there about seven months; I forget.

Q. Where did you go after that?

A. To Yet Sang Tong, forget street and number, and how long I stay there as part of time I sleep in gambling-house.

Q. How long do you think you lived at Yet Sang Tong?

A. I don't know, I think 6 or 7 months; it is on Alameda Street.

Q. Where did you live just prior to coming back to Yuma?

A. I go back to the Quong Yick store and stay there until I come to Yuma, about three or four weeks I think.

Q. I will now read you a sworn statement made by Wong Yut, at Los Angeles, Cal. on January 14, 1915.

(Testimony of Wong Back Sue.)

(Statement of Wong Yut, which is attached to the application for warrant of arrest in this case, and is referred to as a part of the record herein, was read to the alien.)

Q. What have you to say about this statement?

A. I think Wong Yut forget about it.

Q. Did you know Wong Yut when you registered in 1894, and received your certificate of residence?

A. Yes, that was when I first came to Los Angeles, from Stockton, Cal.

Q. Did you not tell me in your previous statement that you did not know Wong Yut during the registration period, and that you had only known him for ten years?

A. I knew him a little bit when I registered, but I get well acquainted with him about ten years ago, and sometimes live at his store.

Q. Wong Yut states that you only lived at his store four or five weeks just before you left for Yuma.

A. Yes, I live there then and a long time before that also, he forget about it.

Q. Did you not live in Mexicali, Mexico, within the last two months before coming to Yuma?

A. No, I never lived there. [21]

Q. Wong Yut also states that you worked for some American people in Los Angeles.

A. He don't know what I do; I never worked for any American people in Los Angeles.

Q. I will now read you a statement made by Wong

(Testimony of Wong Back Sue.)

Sai Gin, *alias* Dr. Wong, at Los Angeles, Cal., on January 14, 1915.

(Statement of Dr. Wong which is attached to the application for warrant of arrest in this case, marked exhibit "H" and is referred to as a part of the record herein, was read to the alien.)

Q. What do you say to Dr. Wong's statement?

A. Dr. Wong, he forget about my leg, and he also treat me for a cough, and sell me medicine.

Q. In Dr. Wong's statement, he says that he treated you for a cough and that there was nothing the matter with your arms or legs.

A. When I first went to Los Angeles he put some medicine and a bandage on my leg.

Q. Was that the only time he treated your leg?

A. No, he put medicine and bandages on my leg three or four times.

Q. How long did he treat your leg?

A. About two months, part of the time he gave me medicine for the leg and I fix the bandage myself.

Q. Could you walk during that time?

A. Yes, part of the time and the rest of the ten months it hurt me, I walked with a crutch.

Q. Dr. Wong says he never doctored you for blood-poisoning in the leg.

A. Yes, he did; he forget it, I guess.

Q. He also states that you went to China in 1906.

A. No, he is mistaken I never went to China at any time, since I first come to the United States.

[22]

Q. Did you not tell me before that you lived at the

(Testimony of Wong Back Sue.)

Quong Yick store the last three or four months in 1914, just before you came to Yuma?

A. I don't remember; I live there three or four weeks last time.

Q. Did you ever act as a witness in any Chinese case in the United States? A. No, never.

Q. Do you deny the evidence offered by the witnesses produced in this case, who swear that they have seen you in Mexico?

A. Yes, because I never was in Mexico.

Q. You are now afforded an opportunity to inspect the warrant of arrest and all the evidence upon which the same was issued, and you are advised of your right to be represented by counsel at this hearing. Do you wish to avail yourself of this right?

A. Yes, I talk with my cousin and friends and let you know.

Q. How long do you want in which to secure an attorney?

A. I don't know, I have no money, and maybe my clansmen get one for me; I think about three days.

Q. Have you any witnesses to offer in this case?

A. I don't know until I talk with my countrymen and the lawyer.

The further hearing of this case is continued and adjourned until January 27, 1915, at 2 o'clock, P. M.

CHARLES B. FRANKLIN,

Immigrant Inspector. [23]

[Hearing Before Immigrant Inspector, January 27,
1915.]

U. S. DEPARTMENT OF LABOR.

Immigration Service.

Yuma, Arizona.

Office of Sheriff,

Yuma Co., Arizona, January 27, 1915.

Time 2:00 P. M.

Continued hearing in the case of Wong Back Sue,
pursuant to adjournment on January 24, 1915.

Present: CHARLES B. FRANKLIN, Examining
Inspector and Secretary.

FONG SHOU, Interpreter (Chinese,
sworn).

(Examining Inspector to Alien.)

Q. Have you secured counsel to represent you at
this hearing?

A. Not yet; I would like one more day in which to
secure an attorney, as Mr. Robertson, the attorney
who was to represent me, finds that he is too busy, so
Fong Shue and my cousin Wong Shou, try and get me
a lawyer to-morrow.

Q. Will you be able to secure bond during the
pendency of your case?

A. I don't know; I will talk with my countrymen
and lawyer about that.

The further hearing of this case is continued and
adjourned until January 28th, 1915, at 2:00 o'clock,
P. M.

CHARLES B. FRANKLIN,

Immigrant Inspector. [24]

**[Hearing Before Immigrant Inspector, January 28,
1915.]**

U. S. DEPARTMENT OF LABOR.

Immigration Service.

Yuma, Arizona.

Office of Sheriff,

Yuma Co., Arizona, January 28, 1915.

Time: 2:00 P. M.

Continued hearing in the case of Wong Back Sue,
pursuant to adjournment on January 27, 1915.

Present: CHARLES B. FRANKLIN, Examining
Inspector and Secretary.

FONG SHUE, Chinese Interpreter
(sworn).

(Examining Inspector to Alien.)

Q. Have you been able yet, to secure counsel to
represent you at this hearing?

A. No, not yet.

Q. This case has been continued twice and you
have been granted five days in which to secure coun-
sel, please give me a definite answer; can you secure
counsel by to-morrow?

A. No, I am afraid not as I have no money, and
my countrymen are not able, or do not care to help
me out, so I can do nothing more.

Q. Do you waive all right to be represented by
counsel at this hearing?

A. Yes, I can't help it.

Q. Have you any other evidence to offer in this
case? A. No.

Q. Then you have nothing further to offer in your case, showing why you should not be deported in conformity with law?

A. No, I have told you everything I know. [25]

**[Findings and Recommendation of Immigrant
Inspector.]**

WARRANT HEARING.

**DEPARTMENT OF COMMERCE AND LABOR.
IMMIGRATION SERVICE, MEXICAN BORDER
DISTRICT.**

FINDINGS: From the evidence presented in this case, it is found that Wong Back Sue, *alias* Wong Thet Jung, is an alien; native and subject of China; that he is unlawfully within the United States, in that he entered therein on or about December 18, 1914, at or near Calexico, California (exact date being unknown), without inspection as contemplated by the Immigration Act; in violation of section 36 of the Immigration Act; and, further, that he re-entered the United States in violation of section 7, Chinese Exclusion Act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section, and, brings the alien within the purview of section 21 of the Immigration Act, and subject to deportation thereunder.

RECOMMENDATION. Three years not having elapsed since the entry of the alien herein mentioned, it is respectfully recommended that he be deported to the country whence he originally came, and of which he is a citizen, to wit, CHINA, which recommendation is in accordance with the provi-

sions of sections 20, 21 and 35 of the Immigration Act.

Alien in detention in the Yuma County Jail, Yuma, Arizona, in default of \$3500.

CHARLES B. FRANKLIN,
Immigrant Inspector.

I certify that the foregoing is a true and correct transcript of the record of hearing in this case.

CHARLES B. FRANKLIN,
Secretary. [26]

I hereby certify that during the hearing of which the above is a transcript, I correctly translated from Chinese into English and from English into Chinese, all questions and answers contained in said transcript.

(Chinese Characters.)

FONG SHUE,
Chinese Interpreter. [27]

**[Warrant to Take Alien into Custody and to Grant
Him a Hearing, etc.]**

Bureau of Immigration.

Form 8-C.

WARRANT—ARREST OF ALIEN.

UNITED STATES OF AMERICA,

U. S. Department of Labor.

WASHINGTON.

No. 53944/11.

(El Paso No. 5025/685.)

To F. W. BERKSHIRE, Supervising Inspector, El Paso, Texas, or to any Immigrant Inspector in the service of the United States.

WHEREAS, from evidence submitted to me, it

appears that the alien Wong Back Sue, who landed at an unknown port, on or about the 15th day of January, 1915, is subject to be taken into custody and returned to the country whence he came under section 21 of the Immigration Act approved February 20, 1907, being subject to deportation under the provisions of a law of the United States, to wit, the Chinese Exclusion Laws, for the following among other reasons:

That he re-entered the United States in violation of section 7, Chinese Exclusion Act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section;

And, WHEREAS, from evidence submitted to me, it appears that the said alien has been found in the United States in violation of the act of February 20, 1907, amended by the act approved March 26, 1910, for the following among other reasons:

That he entered in violation of section 36 of said act (rule 13). [28]

I, Louis F. Post, Assistant Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law.

The expenses of detention hereunder, if necessary, are authorized, payable from the appropriation "Expenses of Regulating Immigration, 1915." Pending disposition of his case the alien may be released from

custody upon furnishing satisfactory bond in the sum of \$2500.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 23d day of January, 1915.

(Signed) LOUIS F. POST,
Assistant Secretary of Labor.
CHARLES B. FRANKLIN,
Immigrant Inspector.

Chinese alien, Wong Back Sue, delivered to Inspector Henry Weiss, charge deportation
G. E. B. party, S. P. train 101, January 31, 1915, for conveyance to Los Angeles, Cal.

(On reverse side of sheet:) Office of Immigration Inspector, Yuma, Arizona. The within warrant of arrest for Wong Back Sue was executed by me January 23, 1915, by taking Wong Back Sue into custody.

CHARLES B. FRANKLIN,
Immigrant Inspector. [29]

Form 565.

Application for Warrant of Arrest under Sections 20 and 21 of the Act of February 20, 1907.

U. S. DEPARTMENT OF LABOR.

Immigration Service.

(Place) Los Angeles, California,

January 22, 1915.

L. A. File No. 5528/498.

The undersigned respectfully recommends that the Secretary of Labor issue his warrant for the arrest of Wong Back Sue, male, Chinese alien (telegraphic warrant applied for this date from Los An-

geles, Cal.), the alien named in the attached certificate, upon the following facts which the undersigned has carefully investigated, and which, to the best of his knowledge and belief, are true:

(1) (Here state fully facts which show alien to be unlawfully in the United States. Give sources of information, and, where possible, secure from informants and forward with this application duly verified affidavits setting forth the facts within the knowledge of the informants.)

That the above-named alien is unlawfully within the United States, in that he entered therein on or about December 19, 1914, without inspection as contemplated by the Immigration Act; and, further, that said entry was effected from Mexico, near Calexico, California, at a point on the land border other than as designated by the Secretary of Labor, in violation of section 36 of the said Immigration Act; and, further, that said alien is within the purview of section 21 of the Immigration Act, in that he has been found within the United States, subject to deportation under the provisions of a law of the United States, for the reason that he [30] re-entered the United States in violation of section 7, Chinese Exclusion Act of September 13, 1888, being a Chinese laborer who failed to produce to the proper officer the return certificate as required, by said section.

Statement of alien, dated January 16, 1915, marked exhibit "A," attached hereto.

Certification of George W. Webb, Inspector in Charge, Calexico, California, dated January 16, 1915,

marked exhibit "B," attached hereto.

Statement of D. L. Crane, dated January 16, 1915, marked exhibit "C," attached hereto.

Statement of George Henry, dated January 15, 1915, marked exhibit "D," attached hereto.

Statement of O. L. Hockenberry, dated January 16, 1915, marked exhibit "E," attached hereto.

Statement of Jim Lee, dated January 15, 1915, marked exhibit "F," attached hereto.

Statement of Wong Yut, dated January 14, 1915, marked exhibit "G," attached hereto.

Statement of Wong Sai Gin, dated January 14, 1915, marked exhibit "H," attached hereto.

Train Inspection Card of Inspector Palmer, dated December 19, 1914, marked exhibit "I," attached hereto.

Train Inspection Card of Inspector Frank G. Ellis, dated December 19, 1914, marked exhibit "J," attached hereto.

No verification of landing, Form 505, attached. No record extant.

(2) The present location and occupation of the above-named alien are as follows: Yuma, Arizona. Laborer.

Pursuant to rule 22 of the Immigration Regulations there is attached hereto and made a part hereof the certificate prescribed in subdivision 2 of said rule, as to the landing or entry of said [31] alien, duly signed by the Immigration officer in charge at

the port through which said alien entered the United States.

(Signature) CHAS. T. CONNELL,
(Official title) Inspector in charge.

WAB.

Approved and forwarded:

_____,
Supervising Inspector. [32]

**[Exhibit "A" to Application for Warrant of Arrest
—Statement of Alien.]**

U. S. DEPARTMENT OF LABOR.

Immigration Service.

Yuma, Arizona.

Office of Immigrant Inspector.

January 16, 1915.

4027/4.

In Re—WONG BACK SUE, Status Under investigation.

CHARLES B. FRANKLIN, Inspector and Sec.
CHAN SING JOE, Interpreter. (Sworn.)

WONG BACK SUE, being first duly sworn, testified as follows:

Q. Give all your names.

A. Wong Back Sue is my boyhood name and Wong Thet Jung is my marriage name, that's all.

Q. *Hold* old are you? A. 66 years.

Q. When and where were you born?

A. In Wong Let Village, HP district, China, in Dow Quon-28-12.

Q. When did you first come to the United States?

A. In Tong Gee-7, leaving Hong Kong in May on

(Testimony of Wong Back Sue.)

a Chinese sailing vessel, name forgotten, landing in San Francisco, (date forgotten) after being over two months on the voyage.

Q. How many trips have you made to China since first coming to the United States?

A. None, have been in U. S. ever since my first arrival.

Q. Are you married?

A. Yes, I was married in my native village before coming to the U. S., in Tong Gee-6-April, to Jew Hoy, still in my native village.

Q. Have you any children?

A. Yes, only one boy, who is about 40 or 41 years of age, in native village, never been in U. S.

Q. Is he married?

A. Yes, but his wife dead.

Q. Did he ever have any children? A. No.

Q. Have *yo* any other children? A. No.

Q. Are your father or mother living?

A. No, dead long time. [33]

Q. Have you any brothers or sisters?

A. No, I am the only one.

Q. When did you arrive in Yuma last time?

A. I left Los Angles on January 8th at 8:00 A. M., arriving in Yuma at 3:30 P. M. same day.

Q. Have you ever lived in Yuma before?

A. Yes, three or four years ago.

Q. Please tell me whether it is three or four years since you lived in Yuma? A. 3 years ago.

Q. When you left Yuma did you go direct to Los Angeles? A. Yes.

(Testimony of Wong Back Sue.)

Q. When did you leave Yuma at that time?

A. In July of 1912.

Q. That would not be three years until July, 1915?

A. Yes.

Q. Have you been in Los Angeles ever since you left Yuma at that time? A. Yes.

Q. Why did you leave Yuma to go to Los Angeles at that time?

Q. I fell over a box in the dark and bruised my right shin, and blood-poisoning set in, I went there for medical treatment,

Q. Are you sure that you have been and lived in Los Angeles all of the time during the past year and have not made any side trips?

A. Yes, I live there all the time.

Q. Where were you on December 5, 1914?

A. In Los Angeles.

Q. Were you in Los Angeles on December 18, 1914? A. Yes.

Q. What doctor treated your leg for blood-poisoning?

A. Doctor Wong Leng Woon, doctor for the Yick Sang Tong drug store.

Re Wong Back Sue, Page 2.

Q. How long were you under treatment of Dr. Wong?

A. Over two months, just after I arrived in Los Angeles from Yuma.

Q. Were you treated for any other ailment, while in Los Angeles, other than your infected leg.

A. No. [34]

(Testimony of Wong Back Sue.)

Q. Where did you live during the time that you were in Los Angeles?

A. In Quong Yick store on Los Angeles Street, don't remember No.

Q. How long, and at what time did you live there?

A. The last three or four months in 1914, just before coming to Yuma.

Q. When you first went to Los Angeles in July, 1912, where did you live?

A. At Haw Lun Fong, in a small street in Chinatown, forget the name and I live there over a year.

Q. When you left Haw Lun Fong, where did you go to live?

A. To Mo Wun Fong, in Chinatown, forget street, and I live there about 16 or 17 months.

Q. Did you leave Los Angeles, at any time since you went there in July, 1912, until you returned to Yuma, on the 8th of this month?

A. No, I live all the time in Los Angeles, and did not go away from there.

Q. What work have you done in Los Angeles during the past three years?

A. I did not work at all as my leg was too bad.

Q. How much money did you have when you left Yuma? A. About \$300.

Q. Did you live on that amount for three years?

A. No, part of the time I live with friends that I didn't pay.

Q. Did you live in Yuma when you hurt your leg?

A. Yes, I live on First Street, between Main and Gila, forget number.

(Testimony of Wong Back Sue.)

Q. How did you happen to hurt your leg?

A. Someone left a big box outside of the door of my house and when I came out, stumbled over it and fell bruising my leg.

Q. Have you ever sent any money, presents or other articles, by a friend, to your family or friends in China?

A. No, only I send money to my wife by mail, not by friend.

Q. When did you first meet Dr. Wong?

A. In July, 1912, when I hurt my leg and went to Los Angeles. [35]

Q. Did you never meet him before?

A. No, never.

Q. Who is the manager for the Quong Yick Co.?

A. Wong Yut.

Q. How long have you known Wong Yut?

A. About 10 years.

Q. Where did you live during the registration period in the U. S.? A. In Los Angeles, Cal.

Q. Did you register at that time and receive a certificate of residence?

A. Yes. (Note: Witness has certificate of residence No. 95243, as laborer at Los Angeles, 761 Alameda Street, issued in the name of Wong Back Sue, by the collector for the First Cal. Dist., on March 31, 1894. Marks; scar lft. side neck; scar lft. side top of head; scar right side neck.)

Q. Did you know Wong Yut during the registration period?

A. No, I meet him first about 10 years ago.

(Testimony of Wong Back Sue.)

Q. What is your occupation? A. Cook.

Q. When were you last employed in that capacity?

A. Last time I cook at Picacho mine in Cal. about 25 miles from Yuma, for over a year.

Q. Have you done any work at all since you left the Picacho mine?

A. No, I did not work since then.

Q. In what year did you leave the Picacho mine?

A. In 1909 and 1910, after which I came to Yuma.
In re Wong Back Sue, Page 3.

Q. How long were you in Yuma before you left for Los Angeles? A. About 3 or 4 months.

Q. If you left the mine in 1910, came to Yuma and stayed 3 or 4 months, and went to Los Angeles, then you must have gone to Los Angeles, in 1910 or 1911, instead of in 1912 as you previously stated.

A. Yes, that's right. [36]

Q. Then you must have been in Los Angeles last time over three years?

A. Yes, I guess I was there about 4 years.

Q. Have you understood the interpreter?

A. Yes.

Q. Write your name in Chinese characters below.

(Witness writes names given below.)

(Chinese Characters) (Chinese Characters)

WONG BACK SUE, *alias* WONG THET JUNG.

I hereby certify that the foregoing is a true and correct transcript of the record of hearing in this case.

CHARLES B. FRANKLIN,
Immigrant Inspector. [37]

**[Exhibit "B" to Application for Warrant of Arrest
—Certificate as to Photograph.]**

U. S. DEPARTMENT OF LABOR.
IMMIGRATION SERVICE.

In answering refer to

Office of Inspector in Charge.

No. 136/23

Calexico, Cal., January 16, 1915.

Photograph.

Photograph.

(Endorsed) Wong Back (Endorsed) Wong Back

Sue, 1/14/15

Sue, 1/14/15

W. A. Brazie,

W. A. Brazie,

Inspector,

Inspector,

Los Angeles, Calif.

Los Angeles, Calif.

I HEREBY CERTIFY that the photograph hereto attached, which is marked "B" on front and endorsed on back "Wong Back Sue, 1/14/15, W. A. Brazie, Inspector, Los Angeles, Calif." was presented by me to the following named witnesses:

O. L. Hockenberry,

D. L. Crane,

Jim Lee and

George Henry,

who positively identified it as taken of a Chinaman they had known in Mexico, as per their statements herewith.

To my certain knowledge said Chinaman has not resided in any town in the Imperial Valley within the last five years.

GEO. W. WEBB,

Inspector in Charge.

[**Exhibit "C" to Application for Warrant of Arrest
—Statement of D. L. Crane.**]

DEPARTMENT OF LABOR.
IMMIGRATION SERVICE.

L. A. file

5555/227

Office of Inspector in Charge,
Calexico, California, January 16, 1915.

In re WONG BACK SUE, Status Under Investigation.

Inspector in Charge GEO. W. WEBB, Examining
Officer.

WILLIAM H. TOMKINS, Stenographer.

D. L. CRANE, being first duly sworn, testified as follows:

Q. What is your name and age?

A. D. L. Crane, 30 years of age.

Q. Where do you reside?

A. Calexico, California.

Q. Were you running a farm in Mexico, across the line from Calexico, California, to the west of Mexicali, Mexico, during the year 1912?

A. Yes, 1912, 1913, and 1914.

Q. What occupation are you following now?

A. Raising stock.

Q. I now show you a photograph of a Chinaman which is marked "B" on the face, and on the back of same "Wong Back Sue," (signed by) "W. A. Brazie, Inspector, Los Angeles, Calif." Have you

(Testimony of D. L. Crane.)

ever seen the Chinaman that the photograph represents, in Mexico? A. I have.

Q. About when did you last see him in Mexico?

A. It must have been about February, 1914, last February, on the Loftus ranch in Mexico.

Q. Who is the foreman of Loftus ranch at the present time? A. George Davis.

Q. Was the Chinaman whose photograph I have described working on the Loftus ranch at that time?

A. Yes, sir, he was the cook.

Q. Are you positive then that the Chinaman whom this photograph [39] represents was on the Loftus ranch in Mexico during a portion of the year 1914?

A. Yes, I am positive of that Chinaman.

Read by witness and signed by him as approved and correct:

D. L. CRANE,
Witness.

I HEREBY CERTIFY that the foregoing is a true and correct transcript of the examination of the above-named witness.

WILLIAM H. TOMKINS,
Stenographer.

WHT.

1/16/15/. [40]

**[Exhibit "D" to Application for Warrant of Arrest
—Statement of George Henry Before Immigrant
Inspector.]**

Calexico

136/23

**DEPARTMENT OF LABOR.
IMMIGRATION SERVICE.**

L. A. file

5555/227

Office of the Inspector in Charge,

Calexico, California, January 15, 1915.

In re WONG BACK SUE, Status Under Investi-
gation.

Inspector in Charge GEO. W. WEBB, Investi-
gating Officer.

WILLIAM H. TOMKINS,
Stenographer.

GEORGE HENRY (Chinese), being first duly
sworn, testified in English, as follows:

Q. What is your name? A. George Henry.

Q. How old are you? A. 48 years old.

Q. Where do you reside and what is your occupa-
tion?

A. Merchant, residing in Mexicali, Mexico.

Q. How long have you lived in Mexicali?

A. 12 months.

Q. I now present to you a photograph of a China-
man which is marked "B." Have you ever seen the
Chinaman this photograph represents?

A. Yes, I have seen him in Mexicali, Mexico.

(Testimony of George Henry.)

Q. On about what date was it you saw him in Mexicali, Mexico, last?

A. Three months ago, I suppose.

Q. You are sure that you saw the Chinaman whom the above-mentioned photograph represents in Mexicali, Mexico? A. Yes.

GEORGE HENRY,
Witness. [41]

I HEREBY CERTIFY that the foregoing is a true and correct transcript of the examination of the above-named witness.

WILLIAM H. TOMKINS,
Stenographer.

WHT.

1/15/15. [42]

**[Exhibit "E" to Application for Warrant of Arrest
—Statement of O. L. Hockenberry Before
Immigrant Inspector.]**

DEPARTMENT OF LABOR.
IMMIGRATION SERVICE.

L. A. file
5555/227

Office of Inspector in Charge,
Calexico, California, January 16, 1915.

In re Wong Back Sue, Status under investigation.
Inspector in Charge, GEO. W. WEBB, Examining
Officer.

WILLIAM H. TOMKINS,
Stenographer.

O. L. HOCKENBERRY, being first duly sworn, testified as follows:

Q. What is your name?

A. O. L. Hockenberry.

Q. How old are you? A. 26.

Q. Where do you reside?

A. In Mexicali, Mexico.

Q. How long have you resided there?

A. About three and a half years.

Q. By whom are you employed?

A. By George A. Davis, as a foreman.

Q. As foreman for George A. Davis, are a good part of your duties performed in Mexico?

A. Yes, sir.

Q. Do you employ Chinese in Mexico?

A. Yes, sir.

Q. I now present to you a photograph of a Chinaman which is marked "B" on the front, and on the reverse of same is "Wong *Buck* Sue." Have you ever seen the Chinaman which this photograph represents, in Mexico?

A. Yes, he cooked for us a year ago last summer for about three months.

Q. What name did he go by?

A. I don't remember.

Q. About how old would you take that Chinaman to be? A. About 40. [43]

Q. Did he speak English?

A. Yes, spoke English some.

Q. You are positive then that the photograph above described is the photograph of a Chinaman who worked on the Davis ranch in Mexico a year ago

(Testimony of O. L. Hockenberry.)

last summer? A. Yes, sir.

Q. Did he ever make any proposition in your presence to pay anybody to take him to Los Angeles?

A. Yes, sir.

Q. What proposition?

A. He offered a party in my presence twenty-five hundred dollars if they would land him in Los Angeles.

Statement read by witness and signed by him as approved and correct:

O. L. HOCKENBERRY,

Witness.

I HEREBY CERTIFY that the foregoing is a true and correct transcript of the examination of the above-named witness.

WILLIAM H. TOMKINS,

Stenographer. [44]

[Exhibit "F" to Application for Warrant of Arrest
—Statement of Jim Lee Before Immigrant
Inspector.]

DEPARTMENT OF LABOR.

IMMIGRATION SERVICE.

L. A. file

5555/227

Office of the Inspector in Charge,

Calexico, California, January 15, 1915.

In re Wong Back Sue, Status under investigation.

Inspector in Charge GEO. W. WEBB, Examining
Officer.

WILLIAM H. TOMKINS,

Stenographer.

JIM LEE, being first duly sworn, testified in English as follows:

Q. What is your name?

A. Jim Lee. (A Chinese.)

Q. Where do you reside and what is your occupation?

A. I live in Mexicali, Mexico, and I am a merchant.

Q. How long have you lived in Mexicali, Mexico?

A. One year.

Q. I now present to you a photograph of a Chinaman which is marked "B." Do you know the Chinaman whom this photograph represents?

A. Yes.

Q. About when and where did you see him the last time?

A. I saw him about last December, in Mexicali, Mexico.

Q. Where was he living on that occasion?

A. He lived in a small house next to the "Mercantile" store, in Mexicali, Mexico.

Q. What name did he go by?

A. Wong; that's all I know.

JIM LEE.

(Signature of witness traced from the notes.)

I HEREBY CERTIFY that the foregoing is a true and correct transcript of the examination of the above-named witness.

WHT.

WILLIAM H. TOMKINS,

1/15/15/.

Stenographer. [45]

[Exhibit "G" to Application for Warrant of Arrest
—Statement of Wong Yut Before Immigrant
Inspector.]

U. S. DEPARTMENT OF LABOR.
IMMIGRATION SERVICE.

Office of Inspector in Charge,
Los Angeles, California.

January 14, 1915.

5555/227.

In Re Wong Back Sue, Status under investigation.

W. A. BRAZIE, Inspector-Stenographer.

CHARLEY LEVY, Chinese Interpreter.

WONG YUT, being first duly sworn, testified as follows:

Q. State all your names.

A. Wong Yut. Married name is Wong Gen Fun.
No others.

Q. How old are you?

A. 45; born in China, Tai Hong village, Hoi Ping district.

Q. What is your occupation?

A. Manager of the Chinese firm of Quong Yick, 411 North Los Angeles Street, Los Angeles, California.

Q. I now show you a photograph, and ask you if you know this man.

(Exhibiting photograph of Wong Back Sue, marked on back Wong Back Sue.)

A. Yes; I know him very well.

Q. What is his name?

A. Wong Thet Jung is his married name.

(Testimony of Wong Yut.)

Q. What other names has he?

A. I don't remember his boyhood name.

Q. How long have you known him?

A. I know him a long time; many years; don't remember how many.

Q. Do you know if he has a certificate of residence? A. Yes.

Q. Did you ever see it? [46] A. No.

Q. Then how do you know he had one?

A. Because I know he was here during the registration period, and he was registered.

Q. When did you see this man last?

A. Just about a week ago.

Q. Where did you see him?

A. Here in my store.

Q. How long did he live in your store?

A. He stayed here about four or five weeks.

Q. Was he in Los Angeles prior to that time?

A. I saw him here three or four years in Los Angeles.

Q. Where did he stay in Los Angeles during this time?

A. I don't know where he lived, but I saw him walking around the streets of the city. He worked around somewhere. He only stayed in my store four or five weeks before he left here.

Q. Where did he go when he left Los Angeles?

A. He said he was going to Yuma.

Q. Where did he come from when he came to Los Angeles? A. I don't know; he never told me.

Q. Where did he work in Los Angeles during

(Testimony of Wong Yut.)

these three or four years?

A. I don't know; for some American people.

Q. What was his physical condition during these three or four years? A. I don't know.

Q. Was he sick during that time?

A. I don't know about that.

Q. Did he make any trips away from Los Angeles during the three or four years you speak of?

A. I don't know anything about that. [47]

Q. Do you know when he came back from China?

A. No.

Q. During the three or four weeks he lived in your store where did he sleep?

A. Slept here in the back room.

Q. You have stated he lived in Los Angeles for the past three or four years. How often did you see him during that time?

A. I don't know how often; but he visited here once in awhile.

Q. Do you know whether he was out of Los Angeles during the past three or four years?

A. I don't know.

Q. Did he ever tell you about being away from Los Angeles during this time?

A. No; but I know he was cooking in Los Angeles during this time.

Q. Where did he cook?

A. I don't know, but he said he was cooking.

(Tracing of signature.)

WONG FONN YUT.

(Chinese Characters.) [48]

[Exhibit "H" to Application for Warrant of Arrest
—Statement of Wong Sai Gin Before Immigrant
Inspector.]

U. S. DEPARTMENT OF LABOR.

Immigration Service.

Office of Inspector in Charge.

Los Angeles, California, January, 14, 1915.

5555/227.

In re WONG BACK SUE, Status under Investigation.

W. A. BRAZIE, Inspector-Stenographer.

CHARLEY LEVY, Chinese Interpreter.

WONG SAI GIN, being first duly sworn, testified as follows:

Q. State all your names.

A. Wong Sai Gin is my married name; boyhood name, Wong Lung; also Dr. Wong.

Q. How old are you?

A. 44; born in China, Hing Wah village, Sun Ning district.

Q. What is your occupation?

A. I am the doctor at the Yick Sang Tong, 759 North Alameda street, Los Angeles.

Q. I now show you a photograph of a Chinese, and will ask if *you him*.

(Exhibiting photograph of Wong Back Sue, endorsed on the back "Wong Back Sue.")

A. Yes; I know him. His name is Wong Thet Jung. I don't know his other name. He told me his name was Wong Thet Jung.

(Testimony of Wong Sai Gin.)

Q. How long have you known him?

A. I know him since 1906.

Q. Where did he live in 1906 when you became acquainted with him?

A. I met him in Los Angeles.

Q. How long did he stay in Los Angeles at that time?

A. Just a little while. He was working as a cook in a country town, at Yuma and other small places.

Q. Do you know whether he has a certificate of residence?

A. Yes. I never saw it, but he told *me had* one.

[49]

Q. When did you see this man last?

A. A few days ago; he came into my store to buy some drugs. He bought four or five packages of health drugs.

Q. What are the drugs he bought used for?

A. For strength.

Q. Was he sick in any way?

A. While he was here he had a little cough.

Q. Did you doctor him? A. Yes.

Q. For what ailment did you doctor him *for*?

A. I doctored him for the cough. He told me he felt tired and had a cough.

Q. Did he have anything the matter with his arms or legs?

A. No. Nothing the matter with him there.

Q. How long did he live in Los Angeles the last time before he left here a few days ago?

A. I have no idea, but I remember he came here

(Testimony of Wong Sai Gin.)

to buy some drugs from me once in a while, and I saw him here a few weeks ago.

Q. How long did you doctor him?

A. Just the one time for the cough.

Q. Where did he work in Los Angeles?

A. He worked in a country town, he told me, but I don't know where.

Q. Did you ever doctor him for blood-poison in the leg?

A. No; he didn't say anything to me about that.

Q. Do you know when he made his last trip to China?

A. He told me in 1906 he made a trip to China, but I don't know when.

Q. Do you know where he came from when he came to Los Angeles this last time? I mean when he came to you to buy the drugs?

A. No; he told me he was working in a country town, but I don't [50] know the name of the place.

Q. And you only doctored him one time?

A. I gave him some medicine about two or three weeks ago, and a few days ago he left here.

Q. Where did he go when he left Los Angeles about three or four weeks since?

A. I asked him where he was going and he said he was going to Yuma.

Q. Do you know when he came to Los Angeles the last time?

A. He said he came here a few weeks ago.

Q. Where did he come from?

A. Some country town, but I don't know where.
(Tracing of signature.)

WONG SI GAM,
(Chinese Characters.) [51]

**[Exhibit "I" to Application for Warrant of Arrest
—Train Inspection Card.]**

Name: Wong Buck Sue. C. R. 95243.

Cert. Age: 45. Occupation: Cook.

From El Centro, Cal., to Los Angeles, Cal.

Via S. P. Rwy. Train No. 37. Date: Dec. 19, 1914.

Other papers or remarks: Scar left side of neck; scar
left side of top of head; scar right side of neck.

Station: El Centro, Cal.

Inspector: PALMER.

**[Exhibit "J" to Application for Warrant of Arrest
—Train Inspection Card.]**

RECORD OF ALIEN.

C. R.

NAME: Wong Back Sue. Cert. No. 95243.

Cert. Age: 45. Occupation: Cook.

From El Centro, Calif. To Los Angeles, Calif.

Via Indio, Cal. Train No. 37. Date 12-19-14.

Other papers or remarks:

Station Indio, Calif.

Inspector: FRANK G. ELLIS.

U. S. DEPARTMENT OF LABOR.

IMMIGRATION SERVICE.

MEXICAN BORDER DISTRICT. [52]

*In the District Court of the United States, in and for
the Southern District of California, Southern
Division.*

In the Matter of WONG BACK SUE on Habeas
Corpus.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to the
Hon. Albert Schoonover, United States Attorney
in and for the Southern District of California:

You and each of you will please take notice that
Wong Back Sue, petitioner herein, does hereby ap-
peal to the Circuit Court of Appeals of the United
States, for the Ninth Circuit thereof, from the order
and decree made and entered herein on the 24th day
of February, 1915, discharging the writ and dismiss-
ing the petition for a writ of habeas corpus filed
herein.

Dated at Los Angeles, California, February 24th,
1915.

W. W. HYAMS,
THOS. A. SANSON and
DUKE STONE,

Attorneys for Petitioner and Appellant Herein.

Due notice of the within notice of appeal and re-
ceipt of a copy thereof is hereby admitted this 23d
day of February, 1915.

ALBERT SCHOONOVER,
United States District Atty.
By M. G. Gallaher,
Deputy.

[Endorsed]: No. 927—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. In the Matter of Wong Back Sue on Habeas Corpus. [53] Notice of Appeal. Filed Feb. 24, 1915, at 30 min. past 10 o'clock, A. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. W. W. Hyams, Thomas A. Sanson, Duke Stone, Attorneys for Petitioner, 1039 Merchants Nat'l. Bk. Bldg., Los Angeles, Cal. [54]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

In the Matter of WONG BACK SUE on Habeas Corpus.

Petition for Appeal.

Comes now, Wong Back Sue, the petitioner above named and the appellant herein, and says:

That on the 24th day of February, 1915, the above-entitled court made and entered its order and decree denying the petition for a writ of habeas corpus, as prayed for, in which said order and decree in said entitled cause certain errors were made as to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herewith:

WHEREFORE, this appellant prays that an appeal may be granted in his behalf to the Circuit Court of Appeals of the United States, for the Ninth Circuit thereof, for the correction of the errors so com-

plained of, and further that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals, for the Ninth Circuit thereof.

Dated at Los Angeles, California, Febry. 24, 1915.

W. W. HYAMS,

THOS. A. SANSON,

DUKE STONE,

Attorneys for Petitioner and Appellant Herein.

[Endorsed]: No. 927—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. In the Matter of Wong Back Sue on Habeas Corpus. Petition for Appeal. Filed Feb. 24, 1915, at 30 min. past 10 [55] o'clock, A. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. W. W. Hyams, Thomas A. Sanson, Duke Stone, Attorneys for Petitioner, 1039 Merchants Nat'l. Bk. Bldg. Los Angeles, Cal. [56]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

In the Matter of WONG BACK SUE on Habeas Corpus.

Assignments of Error.

Now comes the petitioner and appellant in the above-entitled cause, and makes the following assignments of error which he avers occurred in denying

the petition for the writ of habeas corpus herein and dismissing same.

FIRST.

The Court erred in denying the petition for the writ of habeas corpus herein and in dismissing petitioner's petition; for the reason

(a) That there was not sufficient evidence upon which to sustain the warrant of deportation issued in this case by W. B. Wilson, Secretary of Labor of the United States, and

(b) That upon the face of said warrant, it is impossible to tell upon what grounds the deportation of the petitioner is sought, and in that the said warrant charges more than one ground for said deportation, and this petitioner is unable to tell from said warrant upon what grounds the same was issued; and

(c) That the evidence made a part of the record in this cause, or purported evidence, upon which said purported warrant was issued, is not such evidence as to show the petitioner within any class that might be deported under the terms of the said warrant.

SECOND.

The Court erred in not holding that petitioner had been deprived of a fair hearing on his examination before the Immigrant Inspector and the Assistant Secretary of Labor, and

(B) In failing to hold that petitioner was deprived of [57] due process of law in said hearing, and

(C) In failing to hold that petitioner was not accorded the protection of the laws of the United States guaranteed other persons of his class.

THIRD.

And that said Court erred in refusing to hold that said petitioner, if he was subject to deportation, should not be deported to the Republic of Mexico from whence he came, in that the record on file in this cause shows that the petitioner had acquired a legitimate status in the United States by a certificate of residence dated March 31st, 1894, and that if he departed from the United States and returned, the departure was into the Republic of Mexico from which he returned; all since said certificate of residence was issued to the petitioner.

Respectfully submitted,

W. W. HYAMS,

THOS. A. SANSON,

DUKE STONE,

Attorneys for Petitioner.

[Endorsed]: No. 927—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. In the Matter of Wong Back Sue, on Habeas Corpus. Assignments of Error. Filed Feb. 24, 1915, at 30 min. past 10 o'clock, A. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. W. W. Hyams, Thomas A. Sanson, Duke Stone, Attorneys for Petitioner, 1039 Merchants Nat'l. Bk. Bldg., Los Angeles, California. [58]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

In the Matter of WONG BACK SUE on Habeas Corpus.

Order Allowing Petition for Appeal.

On this the 24th day of February, 1915, came Wong Back Sue, petitioner herein, by his attorneys, Sanson & Stone and W. W. Hyams, and having previously filed same herein, did present to this court his petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosecuted by him, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper;

NOW, THEREFORE, on consideration thereof, this Court hereby allows the appeal hereby prayed for, and orders execution and remand stayed pending the hearing of the said cause in the said United States Circuit Court of Appeals for the Ninth Circuit; and it is further ordered that the said Wong Back Sue may be admitted to bail herein in the sum of \$2,500, during the pendency of the appeal taken herein from said judgment; provided said appeal be docketed in the Circuit Court of Appeals within

thirty days from the date hereof, and that the said Wong Back Sue do not depart from the jurisdiction of this Court, but remain and abide by whatever judgment shall finally be entered therein.

Dated at Los Angeles, California, February 24th, 1915.

BENJAMIN F. BLEDSOE,

United States District Judge. [59]

Due service of the within order allowing appeal and receipt of a copy thereof is hereby admitted this 24th day of February, 1915.

ALBERT SCHOONOVER,

United States District Atty.

By M. G. Gallaher,

Deputy.

[Endorsed]: No. 927—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. In the Matter of Wong Back Sue on Habeas Corpus. Order Allowing Appeal. Filed Feb. 24, 1915, at 30 min. past 10 o'clock, A. M. Wm. M. Van Dyke, Clerk, Murray C. White, Deputy. W. W. Hyams, Duke Stone, Thomas A. Sanson, Attorneys for Petitioner, 1039 Merchants Nat'l. Bk. Bldg., Los Angeles, Cal. [60]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

In the Matter of WONG BACK SUE, on Habeas Corpus.

Praeipie [for Transcript of Record].

To W. M. VAN DYKE, Clerk of the District Court of the United States, Southern District of California, Southern Division.

Sir: Please make up transcript of appeal in the above-entitled case to be composed of the following papers:

1. Petition for writ of habeas corpus and all exhibits used or filed in connection therewith.
2. Order for writ of habeas corpus and bond for appearance.
3. Writ of habeas corpus and return thereon.
4. Reply to return on writ.
5. Supplemental petition for writ.
6. Decision of the Court.

Dated Feby. 24, 1915.

W. W. HYAMS,
THOS. A. SANSON and
DUKE STONE,

Attorneys for Petitioner.

[Endorsed]: No. 927—Crim. In the District Court of the United States, in and for the Southern District of California, Southern Division. In the Matter of Wong Back Sue on Habeas Corpus. Praeipie. Filed Feb. 24, 1915, at 30 min. past 10

o'clock A. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. W. W. Hyams, [61] Thomas A. Sanson, Duke Stone, Attorneys for Petitioner, 1039 Merchants Nat'l Bk. Bldg., Los Angeles, Cal. [62]

**[Certificate of Clerk U. S. District Court to
Transcript of Record.]**

*In the District Court of the United States, in and
for the Southern District of California, South-
ern Division.*

No. 927—CRIM.

In the Matter of the Petition of WONG BACK
SUE for a Writ of Habeas Corpus.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing sixty-two (62) typewritten pages, numbered from 1 to 62, inclusive, and comprised in one (1) volume, to be a full, true and correct copy of the Petition for Writ of Habeas Corpus, Order Denying Application for Writ, Transcript of Hearing Before Immigration Officials, Notice of Appeal, Petition for Appeal, Assignments of Error, Order Allowing Petition for Appeal, and Praecipe for Transcript on Appeal, in the above and therein-entitled matter, and that the same together constitute the record in said matter as specified in the said Praecipe filed in my office on behalf of the petitioner and appellant by his attorneys of record;

I do further certify that the cost of the foregoing

record is \$33.60, the amount whereof has been paid me by Wong Back Sue, the petitioner and appellant in said matter.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 30th day of April, in the year of our Lord one thousand nine hundred and fifteen, and of our Independence the one hundred and thirty-ninth.

[Seal] WM. M. VAN DYKE,
Clerk, U. S. District Court for the Southern District of California.

By Chas. N. Williams,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled
4/30/15. Chas. N. W.] [63]

[Endorsed]: No. 2611. United States Circuit Court of Appeals for the Ninth Circuit. Wong Back Sue, Appellant, vs. Charles T. Connell, as Immigration Inspector in Charge, Appellee. In the Matter of the Petition of Wong Back Sue for a Writ of Habeas Corpus. Transcript of Record upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed May 27, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

2611
No. 2737.

9

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Wong Back Sue,

Appellant,

vs.

Charles T. Connell, as Immigration
Inspector in Charge,

Appellee.

APPELLANT'S BRIEF.

Filed

APR 11 1916

DUKE STONE,

F. D. Munckton,
Clerk.

Attorney for Petitioner and Appellant.

No. 2737.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Wong Back Sue,

Appellant,

vs.

**Charles T. Connell, as Immigration
Inspector in Charge,**

Appellee.

APPELLANT'S BRIEF.

STATEMENT.

This is an appeal by Wong Back Sue from an order [pages 8 and 9 of Transcript] denying his petition for a writ of habeas corpus, which set out substantially the following facts, viz.: That petitioner was unlawfully restrained of his liberty by the appellee, immigration inspector, and that said appellee held petitioner pursuant to a warrant issued by the secretary of labor, which charged that appellant entered the United States at Calexico, California, in violation of section 7, Chinese Exclusion Act, being a Chinese laborer who failed to produce to the proper officer the return certificate required by said section [pp. 9 and 10 of Transcript].

No return to the petition was made, though there was an appearance on behalf of appellee, but the court on the petition and what is termed in the order denying the petition as "a transcript of the hearing before the immigration officials of the government," denied the petition.

It will not be disputed that there was issued to petitioner on March 31st, 1894, a certificate of residence and of which he was possessed at the time he was arrested for deportation. This allegation of the petition is not denied and is supported by uncontradicted evidence taken at the hearing on which the warrant was issued. [P. 13 of Transcript.]

The contentions of appellant are:

(a) There was not a fair hearing accorded him by the immigration officials.

(b) There was absolutely no evidence that petitioner entered the United States near Calexico, California, on or about December 18, 1914, as charged in the warrant, or at any other time or place without inspection.

(c) There was absolutely no evidence that petitioner entered the United States at any time or place in violation of section 36, rule 13, of the Act of Congress, as amended by the act approved March 26, 1910, or that he had entered in violation of section 7, Chinese Exclusion Act of September 13, 1888, and

(d) If petitioner deserved deportation, then it should be to Mexico, being the country from whence it is the claim of the government he came or entered the United States.

ARGUMENT.

The warrant [pp. 9 and 10 of Transcript] was read to petitioner at Yuma, Arizona, January 24, 1915 [p. 12 Transcript], whereupon he seems to have been very thoroughly questioned, and from which it appeared that a certificate of residence (No. 95,243) had been issued to petitioner March 31, 1894, and at which time certain statements hereinafter referred to were shown him; and from all of which it appears that he never was in Calexico, California.

After this grilling examination had closed, the immigration officer [p. 21 of Transcript] for the first time advised him that he was entitled to counsel.

Said statement of petitioner [pp. 12 to 21, inclusive, of Transcript] nowhere shows that he entered the United States at Calexico, California, or any other place without inspection, or without producing a proper return certificate.

The close, grilling examination was given petitioner and thereafter he was confronted with certain purported statements. The train inspection card [p. 50 of Transcript], while a portion of the record on which deportation was ordered, was never at any time identified by the party purporting to sign it. It would not be admissible in evidence in an ordinary civil case involving a meager sum. Inspector Palmer was not produced or accounted for. It is not the case of where an *ex parte* statement is fully identified and then offered as was sustained in the case of *Healy v Backus*, 221 Fed. R. 358.

The charge against petitioner was that he unlawfully entered the United States at Calexico, California, on or about December 18, 1914, being a Chinese laborer who failed to produce the return certificate.

The only possible claim to support this is the statements of some parties who say they at one time saw the party, who was represented by a picture claimed to be that of petitioner, in or near Mexicali, Mexico. There is no statement of any kind from anyone that he entered the United States at Calexico, or that he failed to produce a return certificate, if he entered there. Why was not the immigration officer at Calexico produced to prove the charges? Having charged that he entered at this place without inspection, the burden to offer at least some proof of the fact was necessary.

The evidence is not sufficient to identify the picture referred to as the picture of the petitioner. The picture identified by petitioner is not with a fair degree of clearness shown to be that of petitioner.

Re Bun Chaw, 220 Fed. R. 387.

There was no sufficient evidence in the case at bar to overcome the legal effect of the certificate issued to him March 31, 1894.

Li Hop Tong v. U. S., 209 U. S. 453.

It has also been held that if the examination was unfair before the immigration inspector, then the hearing before the secretary was also unfair, and that deportation should not be had.

U. S. v. Ruiz, 203 Fed. R. 443.

Under the law, the petitioner, if he was out of the United States (holding the certificate of residence, as he did, in the United States), had a right to re-enter the United States at a designated point, of which Calexico is one. This right is only limited to *inspection*.

Should there not be some evidence of an entry in the manner charged?

The statement of Inspector Palmer and others not taken at the time of the hearing should not in any way be considered.

Whitefield v. Hanges, 222 Fed. R. 751;

McDonald v. Sin Tok Sam, 225 Fed. R. 710;

Ex parte Sati, 215 Fed. R. 173;

Ex parte Lam Tuk Tak, 217 Fed. R. 468.

These *ex parte* statements not made in the presence of the alien were apparently held harmless in Healy v. Backus, 221 Fed. R. 358, upon the ground that in that particular case there was other sufficient, pertinent testimony to sustain the order of deportation.

By immigration rule 13, Calexico is, among other places (under section 36 of the Immigration Act), made a port of entry. The sole charge against the petitioner is an entry at this port without producing to the officer his return certificate. How easy it would have been to have produced the officer or his records to prove this.

The government claims that he was seen on a ranch near Mexicali a short time before his arrest, and even if this be true it is entirely possible for him to have

entered the United States at one of the other border ports designated under said rule 13, and proof was certainly easily obtainable by the government from these ports to at least, in some measure, prove the failure to produce a certificate.

This is especially true in a case like this, where he produced a valid certificate of residence which had fixed his status in the United States for more than twenty years previous to his arrest. The burden in such cases is on the government to produce at least some little evidence to prove a wrongful re-entry, which was not done in the case at bar. This is made plain by section 36 of the Immigration Act, which provides:

“That all aliens who shall enter the United States, *except* at the seaports thereof, or *at such other place or places* as the Secretary of Commerce and Labor may from time to time designate, shall be adjudged to have entered the country unlawfully, and shall be deported, as provided by sections twenty and twenty-one of this act.”

It therefore appears that an entry at any port designated by the Secretary of Commerce and Labor (in this instance Calexico) is presumptively lawful. It is alleged that petitioner entered at this port. It is admitted or proven by the government's evidence [p. 13 Transcript] that he had a valid certificate of residence when arrested; but not a scintilla of evidence that he entered at Calexico, or if he did, that he failed (in violation of section 7 Chinese Exclusion Act of September 13th, 1888) to produce a return certificate.

It is therefore respectfully submitted that as petitioner was charged with entry into the United States at a designated port (at which he had a right to enter upon producing a certificate), that he cannot be deported without a scintilla of proof to sustain the charge.

Ex parte Lam Prie, 217 Fed. R. 456.

It is next respectfully submitted that if the government's contention be correct, that the petitioner entered from Mexico, then he should be deported to Mexico.

The status of petitioner was fixed by the issuance to him of the certificate of residence, of which he had been possessed for more than twenty years, as a right of great importance. He had gained a valuable right apart from his native country, and should therefore have been deported (if there was any legal evidence, upon a fair hearing, that he had *entered at Calexico*, and *without inspection*) to the country from whence he came to the United States. His admitted long residence in this country, and residence near the boundary of Mexico, is certainly entitled to some consideration. This is what was intended by sections 20, 21 and 35 of the Immigration Act of 1907. The language provides:

"That the deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this act, shall be to the transpacific or transatlantic ports from which aliens embarked for the United States, *or, if such embarkation was from foreign contiguous territory, to the foreign port at which such aliens embarked for such territory.*"

Our contention as to the construction on the above section is sustained by the following authorities:

Ex parte Gyt, 220 Fed. R. 918;

U. S. v. Redfern, 186 Fed. R. 604;

U. S. v. Ruiz, 203 Fed. R. 441;

U. S. v. Sisson, 206 Fed. R. 450;

U. S. v. Redfern, 210 Fed. R. 548.

It certainly could not be contended that petitioner had lived in China for, at the least, 25 years prior to his arrest. His status was fully fixed by his long association and certificate of residence. These facts did not exist in *Frick v. Lewis*, 58 L. Ed. 967, and that case is not controlling in the case at bar.

The certificate of residence issued by the government of the United States to petitioner on March 31, 1894, fixed upon him a legal status which he might or could lose or forfeit by failing to produce the return certificate; but his failure (if there was such) placed his domicile in Mexico, where it is contended he lived and labored, and hence Mexico was the country from whence he came after he had lost or forfeited what this government had given him.

No such condition existed in *Frick v. Lewis*, *supra*.

It is therefore respectfully submitted that the order should be reversed and petitioner discharged, or his deportation ordered to Mexico.

Respectfully submitted,

DUKE STONE,

Attorney for Petitioner and Appellant.

UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WONG BACK SUE,

Appellant,

vs.

CHARLES T. CONNELL,

as Immigration Inspector in
Charge,

Appellee.

BRIEF OF APPELLEE

ALBERT SCHOONOVER,

United States Attorney.

CLYDE MOODY,

Assistant United States Attorney.

Counsel for Appellee.

Filed

APR 26 1916

F. D. Monckton,

Clerk.

No. 2737

UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

WONG BACK SUE,
Appellant,

vs.

CHARLES T. CONNELL,
as Immigration Inspector in
Charge,
Appellee.

BRIEF OF APPELLEE.

The statement of the case contained in the brief of appellant is substantially correct. It is true that no return to the petition for a writ of habeas corpus was made, but we do not know of any rule making

it incumbent upon a defendant named in a petition for a writ of habeas corpus to answer the petition. Our understanding is that it is incumbent only upon the defendant named to answer the writ that is served upon him, and in this case, inasmuch as the court denied the writ, there was nothing for the defendant named in the petition, Charles T. Connell, to answer. A glance at the transcript of the record shows that the petitioner had attached to his petition the entire record of all proceedings had in the matter of the deportation of the appellant, and upon which the Assistant Secretary of Labor ordered deportation, and from the record as it appeared before the Honorable Judge Bledsoe, it was apparent that the petition did not state facts sufficient to warrant the granting of the writ.

We will take up the points argued by counsel for appellant in the order in which he has seen fit to argue them.

The first point that counsel argues in his brief is that the petitioner Wong Back Sue was not given a fair hearing by the examining inspector. It is true that the petitioner was examined without counsel immediately upon his arrest under the warrant, but at the close of this examination by the examining inspector (Tr. p. 21) he was afforded an opportunity to secure an attorney and witnesses in his behalf, and a delay granted at his request for that purpose. In this preliminary examination the warrant of arrest was read and explained to the alien (Tr. p. 12) and all of the testimony upon which the warrant of arrest was issued and which was used against the alien

was read to him, and ample opportunity was given the alien to meet all of the testimony adverse to him (Tr. pp. 12-21). Counsel complains that this hearing was unfair, in that the alien was not afforded an opportunity to obtain counsel before he was examined at all. In this connection we desire to call the attention of the Court to Section 22 of the Immigration Act of 1907 as amended by the Acts of March 26, 1910, and March 4, 1913, which reads in part as follows:

“He (the Commissioner General of Immigration) shall establish such rules and regulations, prescribe such forms of bonds, reports, entries, and other papers, and shall issue from time to time such instructions, not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this Act and for protecting the United States and aliens migrating thereto from fraud and loss, and shall have authority to enter into contract for the support and relief of such aliens as may fall into distress or need public aid; all under the direction or with the approval of the Secretary of Labor.”

And under the authority of this law, Rule 22, was promulgated by the Bureau of Immigration of the Department of Labor, Subdivision 4, Paragraph b, part of which rule reads as follows:

“During the course of the hearing the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued; and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be repre-

sented by counsel and shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the Government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in an accompanying brief. If during the hearing new facts are proved which constitute a reason additional to those stated in the warrant of arrest why the alien is in the country in violation of law, the alien's attention shall be directed to such facts and reason, and he shall be given an opportunity to show cause why he should not be deported therefor."

The point in the examination of an alien when it is necessary for an inspector to allow the alien to obtain counsel in order that all rights of the alien may be thoroughly protected, is fully discussed in the case of *Loh Wah Suey vs. Backus*, 225 U. S. 460, quoting from the opinion of the Court, page 469, *et seq.*:

"It is further alleged that Li A. Sim was refused the right to be represented by counsel during all stages of the preliminary proceedings, and was examined without the presence of her counsel and against her will by the immigration officer at the port of San Francisco, and

before she had been advised of her right to counsel and before she was given an opportunity of securing bail, and that afterwards an examination was conducted by the immigration officer, acting under the orders of the Commissioner of Immigration, at which she was questioned by the immigration inspector against her will and without the presence of counsel, who was refused permission to be present, and that at certain stages of the proceedings she was refused the right to consult with counsel. This objection, in substance, is that under examination before the inspection officer at first she had no counsel. Such an examination is within the authority of the statute, and it is not denied that at subsequent stages of the proceedings and before the hearing was closed or the orders were made she had the assistance and advice of counsel."

In the present case, the hearing was continued twice to afford the alien opportunity to obtain counsel (Tr. pp. 21, 22), and at the third hearing the alien waived all right to be represented by counsel and stated that he had no evidence to offer in his behalf (Tr. pp. 23, 24), whereupon findings were rendered and he was ordered deported by the Assistant Secretary of Labor.

Therefore, in view of the law as laid down by the Supreme Court and the condition of this record, we believe that the alien was afforded every possible opportunity to present evidence in his behalf and to be represented by counsel at the proper time. In a

case recently decided by Judge Rose for the District of Maryland, entitled *Ex Parte Wong Yee Toon* (227 Fed. 247), the Court says:

“The petitioner denies that he had such a (fair) hearing, because, and only because, when first arrested he was examined by the Inspector before he had counsel or any opportunity to procure counsel. Probably there are few or no verbal tests by which to determine whether the immigration authorities have given an alien a fair hearing, but the real question is, have they honestly and by means which would seem fair to a reasonable man, not trained in law, sought to arrive at the truth in order that they may do justice? If their actions, taken as a whole, show that their inquiry was not a fair and honest effort to obtain such result, their action is not binding on the courts, whether from a technical standpoint their procedure was or was not open to criticism.”

Applying this test to the case at bar, we believe that the court will arrive at the conclusion that the defendant had a fair hearing.

Counsel argues that the train inspection card (Tr. p. 50) while a portion of the record on which deportation was ordered, was never at any time identified by the party purporting to sign it. We do not believe that such identification was necessary. The card was read to the alien (Tr. p. 14) and he was given an opportunity to meet the allegations of said card. Furthermore, it appears from the transcript that the card was made out by an immigrant in-

spector and was a part of the files of the Bureau of Immigration. In departmental proceedings, the rule is well established that the inspector is not bound by the technical rules of evidence, and this point is so well settled in this character of proceeding that we do not believe it necessary to take the time of the court in quoting decisions thereon. The card was identified by the examining inspector to the alien and was a part of the record, and while in our opinion it had very little weight, if any at all, in the decision arrived at in this case, nevertheless it was some evidence and as such entitled to a place in the record if the inspector saw fit to introduce it. (Healy vs. Backus, 221 Fed. 358.)

Counsel argues in his brief (page 6) that the photograph identified by petitioner is not with a fair degree of clearness shown to be that of petitioner. A reading of the transcript, page 15, discloses that the examining inspector presented a photograph to the alien, which photograph was identified by the alien as a photograph of himself, and which the inspector further identified to the alien as the one to which certain statements of four witnesses were attached and which was attached to the application for the warrant of arrest in this case. On page 36, et seq, of the transcript, appear statements of O. L. Hockenberry, D. L. Crane, Jim Lee and George Henry, who positively identify the photograph identified by Wong Back Sue as a photograph of himself on page 15 of the transcript, as that of a Chinaman they had seen in Mexico within a short time prior to

the arrest of the appellant, and on page 36 of the transcript appears the affidavit of George W. Webb, Inspector in Charge at Calexico, to the effect that the photograph marked "Wong Back Sue" and marked "B" on the front, being the same one identified on page 15 of the transcript, was by him shown to the said four witnesses above named. In view of this situation, we fail to see how counsel can contend that the photograph was not shown positively to be that of Wong Back Sue. The case is not the same as that of Bun Chew, 220 Fed. 387, inasmuch as in that case the identification of the photograph was not complete. However, in passing, we may state that in the Bun Chew case, it being a case originating in the Southern District of California, the photographs were afterwards more exactly identified and the alien ordered deported, whereupon he appealed to this court and his case has been under consideration by this court for a period of about three months.

On page 7 of the brief of counsel for appellant, he argues that if the petitioner was out of the United States and holding, as he did, a certificate of residence in the United States, he had a right to re-enter the United States at a designated port, and that Calexico is a port of entry designated by the Secretary of Labor. Counsel overlooks the fact that Wong Back Sue (Tr. p. 12) testified that he is a subject of China, of the Chinese race, and born in China, and by occupation a laborer. Therefore, he is of a special class of aliens, which class (Chinese laborers) is prohibited by Congress from entering the

United States by the laws commonly known as the Chinese Exclusion Laws; and under these laws the Secretary of Labor (formerly the Secretary of ~~the~~ ^{Commerce} ~~Interior~~) has power to designate the ports at which Chinese persons, not of the prohibited class, may enter the United States and by authority of such law the Secretary has named, in the State of California, two ports, and only two, through which Chinese, not of the restricted class, may enter the United States, to-wit, the ports of San Diego and San Francisco. Rule 1 of the Rules approved January 24, 1914, by the Bureau of Immigration under the Treaty Laws and Rules Governing the Admission of Chinese.

“No Chinese person, other than a Chinese diplomatic or consular officer and attendants, shall be permitted to enter the United States elsewhere than at the ports of San Francisco, Cal.; * * * San Diego, Cal.; * * *” and other ports named.

Rule 13 of the same provides the manner in which a Chinese *laborer* domiciled in the United States, desiring to leave the United States may assure his return by getting what is known as a laborer's return certificate, and said rule states that he may depart from the United States only through one of the ports designated in Rule 1, and that he must re-enter the same port. Therefore, counsel's argument that the Chinese laborer Wong Back Sue had a right to re-enter the United States through the port

of Calexico is futile, and can avail nothing. And it would have been a useless procedure to have put the records of the Bureau of Immigration into evidence to show that the alien had not departed nor re-entered through the port of Calexico, inasmuch as he is prohibited from so doing by law.

Counsel further argues that there is no proof that the alien entered the United States. We submit that this is begging the question, inasmuch as there are four statements in evidence to the effect that the alien was seen in Mexico and if he was in Mexico he could not have gotten back into the United States without crossing the international boundary line. The certificate of residence provided for by the Chinese Exclusion law and which the alien presented, to-wit, Certificate of Residence No. 95243, lost its efficacy when the appellant left the United States without procuring a return certificate, and when he returned to the United States, this instrument was absolutely void, unless he had procured, prior to his departure, a return certificate and had properly re-entered the United States through the port of his departure. Therefore, it was incumbent upon the examining inspector in this case to show only that the defendant had been without the United States, whereupon the burden of proof would rest upon the alien to show that such departure was lawful, and inasmuch as he has denied that he was without the United States, he cannot now be heard to say that it is not shown that his re-entry into the United States was illegal. He has offered no return certificate, and his denial of

his departure from the United States must be taken as proof positive that such departure was without the means afforded by law to effect a legal re-entry. We do not believe that this court will hold that the Government must be put to the almost impossible task of examining all of the records of the Department of Labor on the arrest of every alien, but, on the contrary, we believe that this court will hold that where an alien is arrested, if he has a legal status, it is incumbent upon him at least to notify the immigration inspector of such legal status, so that an examination may be held and it may be determined whether or not he is in reality entitled to remain in the United States.

The last point that counsel makes in his brief and the one that we are constrained to believe is the one in which he places the most confidence, is that if Wong Back Sue shall be ordered deported, he should be ordered deported to the Republic of Mexico, and not to China. The place to which deportation is to be made is governed by Sections 20, 21 and 35 of the Immigration Act of 1907, as amended, Section 35 reading:

“That the deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this Act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarkation was from foreign contiguous territory, to the foreign port at which said aliens embarked for such territory.”

Wong Back Sue testifies that he is of the Chinese race, a subject of China, and born in China, came to the United States a good many years ago and had never left the United States since. The evidence produced against him showed that he was temporarily without the United States, laboring, in the Republic of Mexico, but there was no evidence to show that he had acquired a domicile in the Republic of Mexico, and in the absence of such proof and more especially in the absence of even a claim that he had acquired such domicile in the Republic of Mexico, the Secretary of Labor would be unwarranted in deporting him to any other country than that from which he came, to-wit, China.

The case of *Frick vs. Lewis*, 233 U. S. 91, is absolutely determinative of this point. We have carefully examined the cases cited by counsel upon this point, and we are satisfied that if the court takes the time to read them, that it will see that none of the cases cited by counsel is a parallel case with the one at bar, and that in no case has an alien ever been ordered deported to a country other than the trans-Atlantic or trans-Pacific port from which he came, except when it appears from positive and indisputable proof that he has acquired a domicile in some other country.

Therefore, in view of these facts, we believe that the order of the lower court denying the petition should be affirmed.

ALBERT SCHOONOVER,
United States Attorney.

CLYDE MOODY,
Assistant United States Attorney.
Counsel for Appellee.

United States
Circuit Court of Appeals

For the Ninth Circuit.

S. T. HILLS, as Trustee of the Estate of MAX JOSEPH,
Doing Business as WORKINGMEN'S CLOTH-
ING STORE, Bankrupt,

Petitioner,

VS.

MAX JOSEPH, Doing Business as WORKINGMEN'S
CLOTHING STORE, Bankrupt,

Respondent.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of Law,
of an Order of the United States District
Court for the Western District of
Washington, Northern Division.

Filed

JUL 16 1915

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals

For the Ninth Circuit.

S. T. HILLS, as Trustee of the Estate of MAX JOSEPH,
Doing Business as WORKINGMEN'S CLOTH-
ING STORE, Bankrupt,

Petitioner,

vs.

MAX JOSEPH, Doing Business as WORKINGMEN'S
CLOTHING STORE, Bankrupt,

Respondent.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of Law,
of an Order of the United States District
Court for the Western District of
Washington, Northern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*United States Circuit Court of Appeals for the
Ninth Circuit.*

No. 5431.

In the Matter of MAX JOSEPH, Doing Business
as Workmen's Clothing Store,
Bankrupt.

Petition for Review.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

Comes now S. T. Hills of Seattle, Washington, and respectfully shows unto the Court:

First. That on the 22d day of March, 1915, one Max Joseph of Everett, Snohomish County, Washington, was adjudicated a bankrupt in the United States District Court for the Western District of Washington, Northern Division, and that thereupon the matter was referred to Robert McMurchie, Referee at Everett for further proceeding. That thereafter your petitioner was, after notice duly given, elected Trustee of the above-named bankrupt and is now the duly qualified and acting Trustee of said estate.

Second. That in his said petition for adjudication, the said bankrupt claimed as exempt, certain dry goods, clothing, etc., out of his stock of merchandise in lieu of the animals mentioned in subsection 40, section 563 of Remington & Ballinger Code of the State of Washington. That the provision of said code is as follows:

“To every householder two (2) cows with their calves, five (5) swine, two (2) stands of bees, thirty-six (36) domestic fowls and provisions and fuel for the comfortable maintenance of such householder and family for six (6) months; also feed for such animals for six months:

“Provided that in case such householder shall not possess or shall not desire to retain the animals above named he may select from his property and retain other property not to exceed Two Hundred Fifty and no/100 (\$250.00) Dollars, coin, in value. The selection in the proviso mentioned shall be made in the manner and by the person and at the time mentioned in subdivision three and said selection shall have the same effect as selections made under subdivision three of this section.”

Third. That on April 9th, 1915, your petitioner herein, as Trustee, filed with the Referee, an order refusing to set aside the lieu exemptions. The entire stock of merchandise of the bankrupt was sold by your petitioner, there being a stipulation between your petitioner and the said bankrupt that in case said lieu exemptions were allowed by the Court, the said sum of Two Hundred Fifty and no/100 (\$250.00) Dollars should be paid in cash instead of in merchandise. That a copy of your petitioner's order refusing to set aside the lieu exemptions is hereto attached and marked exhibit “A” and made a part hereof.

Fourth. That thereafter and on April 10th, 1915,

said bankrupt filed with said Referee his exceptions to the order of the Trustee refusing to set aside said lieu exemptions, a copy of which exceptions is hereto attached to this petition, marked exhibit "B" and made a part hereof.

Fifth. That thereafter and on April 28th, 1915, said Referee made and signed an order refusing the order of the Trustee and directing him, the said Trustee, to pay said bankrupt the sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, out of the proceeds derived from the sale of the stock of merchandise of said bankrupt. That a copy of said order is hereto attached marked exhibit "C" and by reference made a part hereof.

Sixth. That thereafter and on May 3d, 1915, your petitioner filed his petition for review in the United States District Court for the Western District of Washington, Northern Division and that thereupon said Referee duly certified said proceeding for review to the judges of the said court. That a copy of said petition for review is hereto attached marked exhibit "D" and by reference made a part hereof. That thereafter and on May 17th, 1915, pursuant to notice of hearing duly given, a hearing was had thereon and on May 20th, 1915, said court acting through the Honorable Jeremiah Neterer, Judge thereof, filed its opinion affirming said order of the Referee, a copy of which opinion is hereto attached marked exhibit "E" and by reference made a part hereof.

Seventh. That no proof was taken in connection with the determination by said Referee or by the

Honorable Jeremiah Neterer, and the entire proceeding upon which said orders were grounded appear in the exhibits hereto attached.

Eighth. Your petitioner charges the fact to be that the said District Court erred in affirming the order of the said referee reversing the order of the Trustee refusing to allow said bankrupt the lieu exemptions. Your petitioner further charges that under the laws of the State of Washington by virtue of which said exemptions were claimed by said bankrupt and under the decision of the Supreme Court of the said State, said bankrupt is not entitled to said exemptions.

Ninth. Your petitioner therefore prays that the order of the District Court be set aside and held for naught and that by the order of this Court it be decreed that said lieu exemptions be not allowed the bankrupt and that your petitioner be given such other relief as shall be proper.

That an order be entered directing the manner and time of service of this petition.

CASSIUS E. GATES and

L. A. MERRICK,

Attorneys for Petitioner.

State of Washington,
County of King,—ss.

S. T. Hills, the petitioner mentioned and described in the foregoing petition does hereby make solemn oath that the statements contained therein are true according to the best of his knowledge, information and belief.

S. T. HILLS.

Subscribed and sworn to before me this 4 day of June, 1915.

[Seal] CASSIUS E. GATES,
Notary Public in and for the State of Washington,
Residing at Seattle.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

No. —.

In the Matter of Petition of S. T. HILLS for Review.

In the Matter of MAX JOSEPH, Doing Business as
WORKINGMEN'S CLOTHING STORE,
Bankrupt.

[Notice of Filing of Petition for Review.]

To S. A. Bostwick, Attorney for Max Joseph, Bankrupt.

You are hereby notified that on the fourteenth day of June, 1915, at the hour of 12 o'clock M., we will file in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, a petition for Review in the above-entitled cause, a copy of which petition is hereto attached as a part of this notice and we will then ask to have the case docketed and the necessary order made therein to have such case set down for hearing.

CASSIUS E. GATES and
L. A. MERRICK,
Attorneys for Petitioner.

I hereby accept service of the above Notice this 7th day of June, 1915, and acknowledge receipt of a copy of said Petition for Review.

S. A. BOSTWICK,
Attorney for Bankrupt.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, for the Ninth Circuit. In the Matter of Petition of S. T. Hills for Review. In the Matter of Max Joseph, Doing Business as Workingmen's Clothing Store, Bankrupt. Filed Jun. 14, 1915. F. D. Monckton, Clerk.

[Endorsed]: No. 2613. United States Circuit Court of Appeals for the Ninth Circuit. S. T. Hills, as Trustee of the Estate of Max Joseph, Doing Business as Workingmen's Clothing Store, Bankrupt, Petitioner, vs. Max Joseph, Doing Business as Workingmen's Clothing Store, Bankrupt, Respondent. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, of an Order of the United States District Court for the Western District of Washington, Northern Division.

Filed June 14, 1915.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

S. T. HILLS, Trustee in Bankruptcy,

Petitioner,

vs.

MAX JOSEPH, Doing Business as WORKINGMEN'S
CLOTHING STORE,

Respondent.

In the Matter of MAX JOSEPH, Doing Business as
WORKINGMEN'S CLOTHING STORE, Bank-
rupt.

CERTIFIED TRANSCRIPT OF RECORD
IN SUPPORT OF PETITION
FOR REVISION

Under Section 24b of the Bankruptcy Act of Congress,
Approved July 1, 1898, to Revise, in Matter of Law,
Certain Orders and the Judgment of United
States District Court for the Western
District of Washington, North-
ern Division.

*In the District Court of the United States for the
Western District of Washington, Northern,
Division.*

No. 5431.

In the Matter of MAX JOSEPH, Doing Business
as WORKINGMEN'S CLOTHING STORE,
Bankrupt.

Names and Addresses of Counsel.

LOUIS A. MERRICK, Esquire, Attorney for
Trustee in Bankruptcy, Everett, Washington.

CASSIUS E. GATES, Esquire, Attorney for Trustee
in Bankruptcy, 1209 L. C. Smith Building,
Seattle, Washington.

S. A. BOSTWICK, Esquire, Attorney for Bankrupt,
Everett, Washington. [1*]

Exhibit "A."

*United States of America, District Court for the
Western District of Washington, Northern
Division.*

IN BANKRUPTCY.

In the Matter of MAX JOSEPH, Doing Business
as WORKINGMEN'S CLOTHING STORE,
Bankrupt.

TRUSTEE'S ORDER AS TO EXEMPTIONS.

Comes now S. T. Hills, the duly elected, qualified
and acting Trustee in the above-entitled matter, and
makes his order respecting exemptions claimed by

*Page-number appearing at foot of page of Original certified Transcript of Record.

the bankrupt herein, both in original schedules, and in the amended schedules, permitted by the Referee to be filed herein.

And this order is made in accordance with an oral order made at a meeting of creditors, by the Trustee, holden at the office of the Referee in said matter, on the 5th day of April, 1915, at which meeting the bankrupt and his attorney were also present.

The trustee sets aside to the bankrupt as exempt, as claimed in the amended schedules, all wearing apparel of the bankrupt and family of a scheduled value of Seventy-five (\$75.00) Dollars; family pictures and keep-sakes, Twenty-five (\$25.00) Dollars; all household furniture of the bankrupt, of a scheduled value of (\$285.00) Two Hundred Eighty-five Dollars; all books, prints and pictures of a scheduled value of Ten (\$10.00) Dollars.

The trustee refuses to set aside to the bankrupt, as exempt, any of the articles claimed in the amended schedules, as follows:

Clothing and dry goods now in the hands of the Receiver at 2014 Hewitt Avenue, to be selected by the petitioner to the value of Two Hundred Fifty (\$250.00) [2] Dollars in lieu of property mentioned in sub-section 4 of Section 563 of Rem. & Bal. Annotated Code and Statute:

32 lbs. leather @ 40¢.....	\$ 12.80
1 doz. Shoe Polish @ 40¢.....	.65
15 “ Hose @ 65¢.....	9.75
27 “ U. S. Hose @ 65¢.....	17.55
4½ “ Silk hose @ 1.75.....	7.83
16 “ U. S. Hose @ 65¢.....	10.40

10½ “	Hose @ 1.25.....	13.13
16 “	Hose @ 80¢.....	12.80
6 “	Hose @ 1.75.....	10.50
6½ “	Shirts @ 3.75.....	24.37
2 “	Shirts @ 3.75.....	7.50
15 “	Underwear, drawers and shirts @ 3.75 per doz..	55.28
2 “	Union Suits @ 7.50 per doz.....	15.00
4	Matting suit cases @ 1.50.....	6.00
3 “ “ “	@ .75.....	2.25
1 “ “ “	@ 1.25.....	1.25
5 “ “ “	@ 1.00.....	5.00
3 “ “ “	@ 2.00.....	6.00
1 Leather “ “	@ 4.00.....	4.00
1 “ “ “	@ 3.50.....	3.50
1 “ “ “	@ 2.00.....	2.00
1 “ “ “	@ 4.00.....	4.00
1 “ “ “	@ 1.00.....	1.00
1 “ “ “	@ 1.00.....	1.00
1 “ “ “	@ 1.00.....	1.00
1 “ “ “	@ 1.00.....	1.00
1 “ “ “	@ 1.00.....	1.00
1 “ “ “	@ 2.00.....	2.00
1 “ “ “	@ 1.00.....	1.00
1 “ “ “	@ 1.00.....	1.00
1 “ “ “	@ 1.25.....	1.25
1 “ “ “	@ 1.00.....	1.00
1 “ “ “	@ 1.00.....	1.00
4 “ “ “	@ .75.....	3.00
4	Imitation Leather Suit cases @ .75.....	3.00
1	Leather suit case @ 1.25.....	1.25

The Trustee doth make this Order refusing to set aside the above-described articles as exempt, on the ground and for the reason that the bankrupt is not

entitled to claim the same as exempt in lieu of two (2) cows with their calves, five (5) swine, two (2) stands of bees, thirty-six (36) domestic fowls, not possessed by the bankrupt, and upon the ground and for the reason that the articles claimed in the Amended Schedules, claim of which is rejected, as exempt, are not articles of like character with those allowed as exempt. [3]

Dated April 9th, 1915.

(Signed) S. T. HILLS,
Trustee in Bankruptcy.

MAX JOSEPH,

Bankrupt. [4]

Exhibit "B."

In the United States District Court for the Western
District of Washington, Northern Division.

Before ROBERT McMURCHIE, Referee.

No. 5431.

In the Matter of MAX JOSEPH, Doing Business as
WORKINGMEN'S CLOTHING STORE,
To be adjudged Bankrupt.

EXCEPTIONS TO TRUSTEE'S REPORT.

Comes now Max Joseph, the bankrupt herein, by and through his attorney, S. A. Bostwick, and excepts to the Trustee's report herein setting off said bankrupt's exceptions filed herein on the 9th day of April, 1915, in that said report, of said Trustee, fails to allow as exempt and refuses to set off as exempt, to this bankrupt, the following articles set forth and claimed as exempt in schedule B (5) as amended, under subsection four of Section 563 of

Rem. & Bal. Annotated Code of the Statute of Washington:

32 lbs. leather	@ 40¢.....	\$ 12.80
1 doz. Shoe polish	@ 65¢.....	.65
15 doz. Hose	@ 65¢.....	9.75
27 doz. U. S. Hose	@ 65¢ doz.....	17.55
4½ doz. Silk hose	@ 1.75 “	7.83
16 doz. U. S. Hose	@ 65¢ “	10.40
10½ “ Hose	@ 1.25 “	13.13
16 “ Hose	@ 80¢ “	12.80
6 “ Hose	@ 1.75 “	10.50
6½ “ Shirts	@ 3.75 “	24.37
2 “ Shirts	@ 3.75 “	7.50
15 “ Underwear, drawers & Shirts	@ 3.75 “	55.28
2 “ Union Suits	@ 7.50 “	15.00
4 Matting suit cases	@ 1.50 “	6.00
3 “ “ “	@ .75	2.25
1 “ “ “	@ 1.25	1.25
5 “ “ “	@ 1.00	5.00
3 “ “ “	@ 2.00	6.00
1 Leather Suit case	@ 4.00	4.00
1 “ “ “	@ 3.50	3.50
1 “ “ “	@ 2.00	2.00
1 “ “ “	@ 4.00	4.00
1 “ “ “	@ 1.00	1.00
1 “ “ “	@ 1.00	1.00
1 “ “ “	@ 1.00	1.00
1 “ “ “	@ 1.00	1.00
1 “ “ “	@ 2.00	2.00
1 “ “ “	@ 1.00	1.00

1	“	“	“		.....	1.00
1	“	“	“	@ 1.25	.....	1.25
1	“	“	“	@ 1.00	.....	1.00
1	“	“	“	@ 1.00	.....	1.00
4	Matting Suit Cases			@ .75	.....	3.00
4	Imitation Leather					
	Suit Cases			@ .75	.....	3.00
1	Leather suit case			@	.....	1.25
						<hr/> \$250.03

The bankrupt prays that a hearing may be had upon such exceptions and that the same may be argued, as provided in General Order XVII.

Dated this 9th day of April, 1915.

(Signed) S. A. BOSTWICK,
Attorney for Excepting Bankrupt. [6]

Exhibit "C."

*In the United States District Court for the Western
District of Washington, Northern Division.*

No. 5431—IN BANKRUPTCY.

In the Matter of MAX JOSEPH,

Bankrupt.

ON EXCEPTIONS TO THE ORDER OF THE
TRUSTEE DENYING BANKRUPT'S CLAIM
OF CERTAIN PROPERTY AS EXEMPT.

S. A. BOSTWICK, Esq., of Everett, Attorney
for Bankrupt.

CASSIUS E. GATES, Esq., of Seattle, and
LOUIS A. MERRICK, Esq., of Everett,
Attorneys for Trustee.

The bankrupt has made his claim for exemptions,

in property other than money, of an alleged value not exceeding Two Hundred Dollars, in lieu of the animals mentioned in subdivision 4 of section 563 of Rem. & Bal. Ann. Codes and Statutes of Washington. The articles so claimed as exempt are enumerated in the amended schedules filed by the bankrupt and also in the order of the Trustee refusing to set them aside as exempt. The ground of his refusal is stated by the Trustee as follows:

“The trustee doth make this order refusing to set aside the above described articles as exempt, on the ground and for the reason that the bankrupt is not entitled to claim the same as exempt in lieu of 2 cows with their calves, 5 swine, 2 stands of bees, 36 domestic fowl not possessed by the bankrupt, and upon the ground and for the reason that the articles claimed in the amended schedules, claim of which is rejected, as exempt, are not articles of like character with those allowed as exempt.”

It is admitted that the bankrupt is entitled to exemptions; that he did not possess any of the animals, etc., described in subdivision 4 *supra*, and that the articles claimed under this subdivision are not of like character.

The contention of learned counsel for the Trustee is that the exemption statute as construed by the Supreme Court of this State is controlling in the Bankruptcy Court, and [7] that the construction of this statute by the Supreme Court of the State

in Creditor's Collection Association vs. Frank E. Bisbee et al., 80 Wash. 358, precludes the bankrupt from claiming as exempt any property except such as is of like character to that mentioned in said subdivision. This identical question has been squarely decided, adversely to the contention of the Trustee, by the learned Judge of this District, in re J. H. Crook, No. 5351, opinion filed January 14th, 1915. In that matter Judge Neterer discussed counsels contention at considerable length, submitting the argument in the Bisbee case to the closest scrutiny, and deciding that the bankrupt could claim other property in lieu of that mentioned in subdivision 4. This decision is controlling upon the referee and we need go no farther in an investigation of the point presented. We accordingly hold that the bankrupt is entitled, under his claim of exemption, to the property in question. At the time of the sale a stipulation was entered into between the attorney for the bankrupt and the attorney for the Trustee, whereby the Trustee, without prejudice to the rights of the bankrupt might sell said property along with the other property of the bankrupt, and that a sum of Two Hundred and Fifty Dollars be held by the Trustee, in lieu thereof. This being done, the order of the Referee is that the order of the Trustee denying bankrupt's claim of exemption be overruled, and that the bankrupt is entitled to be paid the sum of Two Hundred and Fifty Dollars in the hands of the Trustee, and the Trustee is ordered to pay such sum

to the bankrupt in lieu of the exempt property allowed to be sold under the stipulation.

Dated April 28th, 1915.

(Sgd.) ROBERT McMURCHIE,
Referee in Bankruptcy. [8]

Exhibit "D."

*United States of America, District Court for the
Western District of Washington, Northern Di-
vision.*

IN BANKRUPTCY.

In the Matter of MAX JOSEPH, Doing Business as
WORKINGMEN'S CLOTHING STORE,
Bankrupt.

PETITION TO REVIEW REFEREE'S ORDER.

Now, comes S. T. Hills and represents that petitioner is the duly elected, qualified and acting Trustee in the above-entitled matter, and as such was a party to the following certain proceeding in said bankruptcy pending before Honorable Robert McMurchie, as the Referee in Bankruptcy, in charge thereof, to wit: Exceptions filed by the bankrupt to the order of the petitioner, and Trustee, denying the claim of the bankrupt, for exemptions, in and to certain specific articles of stock in trade, in lieu of certain other specific articles set forth in subdivision 4, section 563, Rem. & Bal. Codes, which said certain specific articles were not possessed by the bankrupt, to wit: Two cows with their calves, five (5) swine, two (2) stands of bees, thirty-six

(36) domestic fowls, and provisions and fuel for the comfortable maintenance of such household, and family, for six months, also feed for the animals for six months.

Which said exceptions to the Order of the Petitioner, and Trustee, having been argued to the said Referee, the said exceptions were sustained and an order made by the Referee in said matter, on the 28th day of April, 1915, reversing and in all things setting aside the order of the trustee disallowing said claimed exemptions to which order of the Referee, petitioner duly excepted. [9]

Said order of the Referee is erroneous in that under and pursuant to the laws of the State of Washington, respecting exemptions, no exception is allowed to the bankrupt, under said subdivision of said section in lieu of said specific articles not possessed by him.

WHEREFORE petitioner prays that said order be reviewed, and reversed, and that the order of the Trustee, denying said claimed exemptions be affirmed and that he be restored to all things he has lost, by reason of such error of said Referee.

Dated May 3d, 1915.

(Signed) S. T. HILLS,
Trustee in Bankruptcy.
MAX JOSEPH,
Bankrupt.

By (Signed) LOUIS A. MERRICK,
His Attorney of Record. [10]

Exhibit "E."

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 5431.

Filed May 20, 1915.

In the Matter of MAX JOSEPH Doing Business
Under the Firm Name and Style of the
WORKINGMEN'S CLOTHING STORE,
Bankrupt.

LOUIS A. MERRICK, for Trustee.

S. A. BOSTWICK, for Bankrupt.

NETERER, District Judge:

On March 22d, 1915, Max Joseph was adjudicated a bankrupt, and the matter on the same day referred to Robert McMurchie, Referee at Everett, for further proceedings. March 31st, 1915, Esther Joseph, Bankrupt's daughter, filed with the Referee, her claim for \$150.00 alleged to be due her from bankrupt for services and labor as clerk in his store, during the months of November and December, 1914, and January, 1915, at a monthly wage of \$50.00 a month. Hearing was had, and testimony of bankrupt and his daughter adduced in support of the claim, and the Referee found that from claimant's own evidence she has been paid in full for all services rendered bankrupt, and wholly disallowed her claim. The matter is before the Court now on peti-

tion for review of the Referee's order. The order of the Referee disallowing her claim is affirmed.

The bankrupt claimed as exempt dry goods, clothing, etc., out of his stock of merchandise, to the value of \$250.00 in lieu of the animals mentioned in subsection 4 of section 563 Remington & Ballinger's Code of Washington. The Trustee refused to set those goods aside as exempt, and on a hearing before the Referee, the order of the Trustee was reversed, and the sum of \$250.00, proceeds of the sale of said goods pursuant to stipulation of the parties pending the hearing [11] before the Referee, ordered paid to bankrupt. The Trustee seeks a review of the Referee's order, and asks a reversal under the decision of the Supreme Court of Washington, in *Creditor's Collection Association v. Bisbee*, 38 Wash. Dec. No. 6. This Court *In re J. H. Crook, Bankrupt*, 219 Fed. 979, held that the Supreme Court in the *Bisbee* case merely decided that *money* could not be held as exempt as "other property" under subdivision 4 of Section 563 of the Washington Statute, and upheld the right of the bankrupt to claim as exempt, personal property other than money, under the subdivision of the section named. That case effectually disposes of the issue here.

The order of the Referee is affirmed.

JEREMIAH NETERER,

Judge. [12]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 5431.

In the Matter of MAX JOSEPH, Doing Business as
WORKINGMEN'S CLOTHING STORE,
Bankrupt.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify the foregoing and attached, to be a full, true and correct copy of Trustee's Order as to Exemptions, Exceptions to Trustee's Report, Referee's Decision on Exceptions to the Order of the Trustee Denying Bankrupt's Claim of Certain Property as Exempt, Petition to Review Referee's Order, Decision of District Judge Affirming the Referee's Order, designated herein respectively as Exhibits "A," "B," "C," "D" and "E," as the originals thereof appear on file in said court at the City of Seattle, Washington, in said District.

Attest my official signature and the seal of the said District Court, at the City of Seattle, Washington, the 22d day of June, 1915.

[Seal]

FRANK L. CROSBY,
Clerk U. S. District Court. [13]

[Endorsed]: No. 2613. United States Circuit Court of Appeals for the Ninth Circuit. S. T. Hills, Trustee in Bankruptcy, Petitioner, vs. Max Joseph, Doing Business as Workingmen's Clothing Store, Respondent. In the Matter of Max Joseph, Doing Business as Workingmen's Clothing Store, Bankrupt. Certified Transcript of Record in Support of Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, Certain Orders and the Judgment of United States District Court for the Western District of Washington, Northern Division. Filed June 28, 1915.

F. D. MONCKTON,
Clerk.

No. 2613

IN THE
United States
Circuit Court of Appeals

FOR THE NINTH DISTRICT

S. T. HILLS, as Trustee of the
Estate of Max Joseph, doing
business as Workingmen's
Clothing Store, Bankrupt,

Petitioner,

vs.

MAX JOSEPH, doing business as
Workingmen's Clothing Store,
Bankrupt,

Respondent.

No. 2613.

OPENING BRIEF OF PETITIONER.

Filed

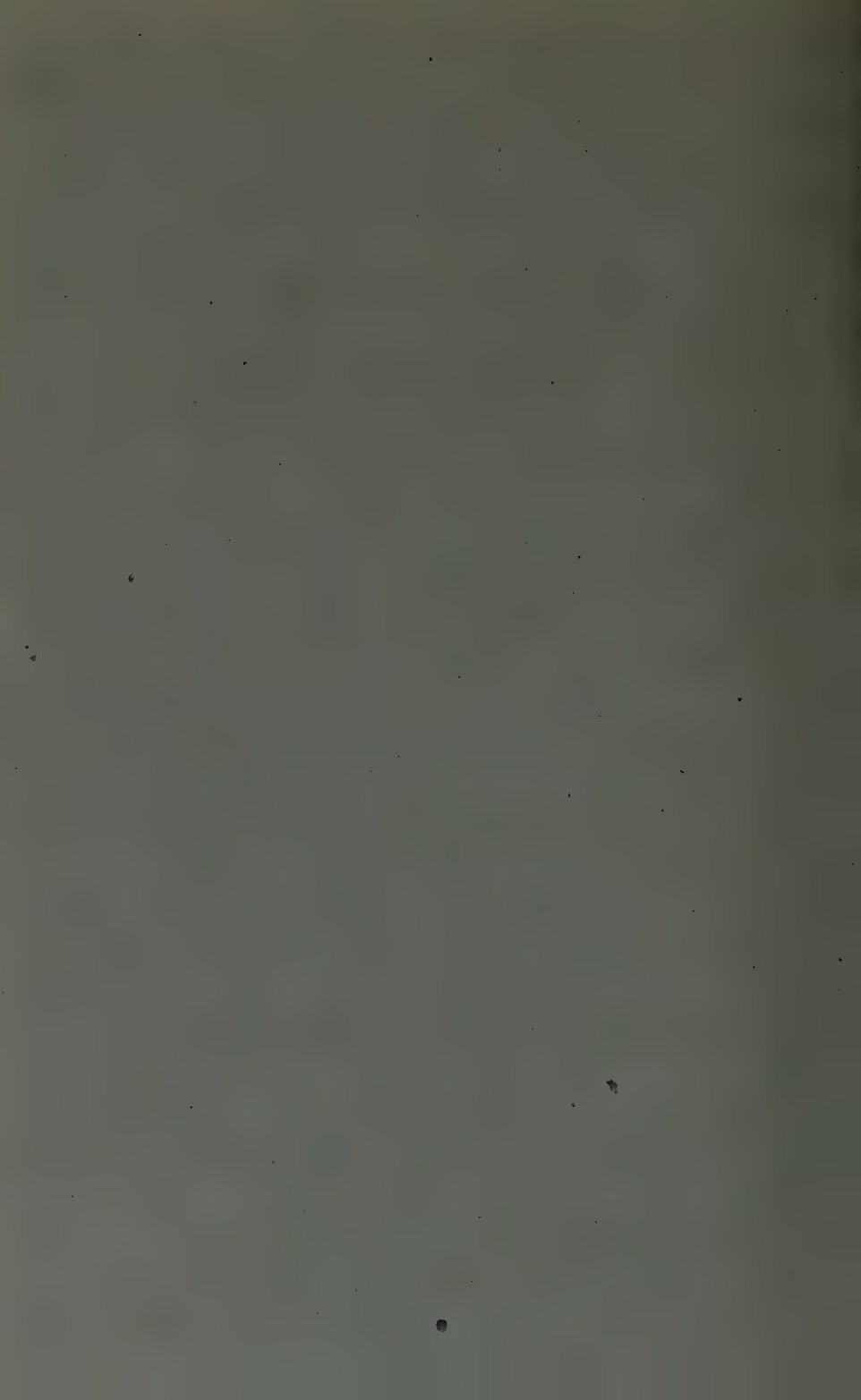
AUG 23 1915

F. D. Monckton,
Clerk.

CASSIUS E. GATES,
1209 Smith Building,
Seattle, Wash.;

LOUIS A. MERRICK,
Everett, Wash.,

Attorneys for Petitioner.



IN THE

United States

Circuit Court of Appeals

FOR THE NINTH DISTRICT

S. T. HILLS, as Trustee of the
Estate of Max Joseph, doing
business as Workingmen's
Clothing Store, Bankrupt,

Petitioner,

vs.

MAX JOSEPH, doing business as
Workingmen's Clothing Store,
Bankrupt,

Respondent.

No. 2613.

OPENING BRIEF OF PETITIONER.

CASSIUS E. GATES,
1209 Smith Building,
Seattle, Wash.;

LOUIS A. MERRICK,
Everett, Wash.,
Attorneys for Petitioner.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH DISTRICT

S. T. HILLS, as Trustee of the
Estate of Max Joseph, doing
business as Workingmen's
Clothing Store, Bankrupt,

Petitioner,

vs.

MAX JOSEPH, doing business as
Workingmen's Clothing Store,
Bankrupt,

Respondent.

No. 2613.

OPENING BRIEF OF PETITIONER.

STATEMENT.

On March 22, 1915, Max Joseph was adjudged a bankrupt in the District Court of the United States, for the Western District of Washington, Northern Division, and the matter was thereupon

referred to Honorable Robert McMurchie, Referee in Bankruptcy.

Petitioner herein was thereafter elected and qualified as trustee, in the matter of said bankruptcy.

The bankrupt, in the schedules attached to the petition for adjudication, claimed as exempt certain specified dry goods and clothing, then constituting part of a general stock of merchandise, in lieu of the animals mentioned in Subdivision 4, Section 563, Rem. & Bal. Codes of the State of Washington, which such subdivision of the statute of Washington is as follows:

“To every householder two (2) cows with their calves, five (5) swine, two (2) stands of bees, thirty-six (36) domestic fowls and provisions and fuel for the comfortable maintenance of such householder and family for six (6) months; also feed for such animals for six months:

“Provided that in case such householder shall not possess or shall not desire to retain the animals above named he may select from his property and retain other property not to exceed two hundred fifty and no/100 (\$250.00) dollars, coin, in value. The selection in the proviso mentioned shall be made in the manner and by the person and at the time mentioned in subdivision three and said selection shall have the same effect as selections made under subdivision three of this section.”

Thereafter the petitioner herein filed with the referee an order, refusing to set aside the claimed lieu exemptions.

The entire stock of merchandise of the bankrupt, in which was comprised the specific articles claimed by him as exempt were sold, by the petitioner pursuant to an order of the referee, there being a stipulation, however, between the petitioner, and the bankrupt, proved by the referee, that in case the lieu exemptions were allowed by the court, as claimed, the sum of \$250.00 should be allowed in cash, instead of specific articles.

Thereupon the bankrupt filed his exceptions to the order of the trustee, refusing to set aside the claimed lieu exemptions, and thereafter upon hearing, the referee made and filed his order reversing the order of the trustee refusing to set aside the claimed lieu exemptions, and directing, pursuant to the stipulation, the payment by the trustee to the bankrupt of the sum of \$250.00, from the monies derived from the sale of the general stock of merchandise.

Thereafter the trustee, petitioner herein, filed a petition to review the order of the referee, and thereupon the referee certified the whole record in

the matter of said order, to the District Court, whereupon a hearing was had, and the district judge duly made and filed his order affirming the order of the referee, which reversed the order of the trustee, refusing to set aside the claimed lieu exemptions.

No question of fact is involved herein. It is solely and purely a question of law as to the construction to be placed upon Subdivision 4, Section 563, Rem. & Bal. Codes of Washington, and the doctrine in reference to such subdivision enunciated by the Supreme Court of the State of Washington.

ASSIGNMENT OF ERRORS.

I.

The district judge erred in the making of the order in this matter, filed May 20, 1915, affirming the order of the referee, which order of the referee reversed the order of the trustee, and which order of the trustee refused to set aside to the bankrupt claimed lieu exemptions. (Record, pp. 19-20.)

ARGUMENT.

The question for the consideration of this court is in very small compass, and it involves the construction placed upon a state statute by a State Appellate Court, and whether such construction will be followed by this court.

The Bankruptcy Act, Section six (6), allows to a bankrupt the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile, etc. The particular state statute with which we are concerned is Subdivision 4, of Section 563, Rem. & Bal. Codes of Washington, which has been set out in full in the Statement of Facts, and we are concerned more particularly with this portion of such subdivision:

“Provided, that in case such householder shall not possess, or shall not desire to retain, the animals above named he may select from his property, and retain other property not to exceed \$250.00 in coin in value.”

The bankrupt in this instance not possessing the animals named in the subdivision, selected from his general stock in trade goods of a scheduled and stated value of \$250.00 in lieu of these animals.

The trustee's position is that such selection is not within the language of the exemption act heretofore quoted, and such we understand to be the holding of the Supreme Court of Washington in the case of

*Creditors' Collection Association vs. Bisbee,
et al.*, 80 Washington, 358; 141 Pacific, 886.

The court in that case, considering the meaning of Subdivision 4, of Section 563, the precise subdivision which is here to be passed upon, say:

“The words, ‘other property,’ appearing in the proviso of Subdivision 4 can refer only to other property of a *like nature* to that specifically mentioned under a well-known rule of statutory construction.” (The italics are ours.)

In that case debtor did not possess animals mentioned, and claimed in lieu thereof, money, or rather a debt from the Northern Pacific Railway Company, to the debtor, in the sum of \$151.52.

In that case the subject of the exemption claim was a debt, owing from a railway company to the debtor. In this case the exemption claim is made upon and out of a stock of goods in lieu of animals.

The Supreme Court of the state say that the lieu clause exemption must by a common rule of statutory construction be held to apply to other property of like nature, and it held that a debt, or the money grown from the debt, was not other property of a like nature.

Is it possible here to hold that manufactured clothing is of a like nature with cows, calves, swine, bees and domestic fowls? Such a holding would seem to violate every rule of construction.

The substantive exemption allowed the debtor by Subdivision 4 is animals living, moving and breathing. The Supreme Court of the state says that if he has not those animals he can, under the lieu clause, select other property of like nature.

Must not then, under the decision of the Supreme Court, his selection be confined under the lieu clause to living, breathing, moving beings, or will this court say that clothing, manufactured, with no breath of life in it, is of a like nature with cows, calves, swine, bees and hens.

This opinion but follows the doctrine of the Supreme Court in the earlier case of *Carter vs. Davis*, 6 Washington, 327; 33 Pacific, 833.

The Supreme Court in the case last cited was called upon to construe Subdivision 3, of Section 563, Rem. & Bal. Codes.

In that case the debtor claimed as exempt \$250.00, proceeds of the sale of live stock, levied upon by the sheriff, none of which was claimed to be exempt at all, and also the sum of \$165.00, the proceeds derived from the sale of two horses, and in that regard the Supreme Court says:

“The claim to this \$250.00 in the hands of the sheriff is manifestly unfounded in law. The sec-

tion of the statute referred to authorizes the selection of 'other household goods, utensils and furniture,' and prescribes the method and by whom such property may be selected, but confers no right to retain or select other property of a *different character* in lieu of that authorized to be selected and retained.'" (The italics in the above quotation are ours.)

So that it will be seen that the Supreme Court of the state, twenty-two years ago, in construing a portion of the exemption statute, which was then the same precisely as it is now, and a portion of this particular section here in question, announced the doctrine to be that under a lieu clause property of like character alone could be selected by the debtor.

Judge Rudkin, in *In re Scheier, et al.*, 188 Federal, 745, where the question before him was, "should the bankrupt be allowed by virtue of Subdivision 4, Section 563, to retain from the partnership assets any property, in lieu of insufficient provisions and fuel for the comfortable maintenance of himself and family for six months," held that the question must be answered in the negative, for a reason stated in answering another question in the same matter, and for the additional reason

"That the statute does not permit the debtor to select other property in lieu of provisions and fuel

for his family, and feed for the animals therein named.”

But this court has, we think, determined conclusively the question here presented, in *In re Gerber*, 186 Federal, 693, opinion by Judge Ross, and in that opinion this court cites as authority the opinion of the Supreme Court of Washington in *Carter vs. Davis*, heretofore cited in this brief, and also in *United States Fidelity Co., etc., vs. Hollingshead*, 51 Washington, 326; 98 Pacific 749.

And this court deduces from the opinion in the case of *Carter vs. Davis* the doctrine:

“If as the court there held the right given by the Washington statute to select ‘other household goods, utensils and furniture,’ in cases provided for, was confined to other property of the same kind, and conferred no right to retain or select other property of a different character in lieu of that authorized to be selected and retained.”

It would seem to follow necessarily that the same construction must be given to like provisions contained in Subdivision 4, Section 563, Rem. & Bal. Codes of Washington.

So that this court has held that a selection of exemptions under a lieu clause, either in Subdivision 3, or Subdivision 4, of Section 563, Rem. & Bal. Codes, must be property of like character, and it seems that it would need little argument to demon-

strate the correctness of the doctrine, not only of the Supreme Court of the State of Washington, but of this court, for Subdivision 3 confers upon the debtor the right to specific personal property, and to select other property in lieu thereof, if he does not possess the same.

Subdivision 4 confers the same right upon the debtor. And both the subdivisions have had a construction placed upon them by the highest court of the state.

As Judge Rudkin well says, in the *Scheier* case,

“The decisions of the highest court of the state construing these laws are controlling upon the Federal courts.”

And Judge Rudkin uses this language:

“The construction placed upon a statute by the highest court within the jurisdiction of the law making body becomes a part of the statute, and if the legislature cannot add to exemptions without impairing the obligation of existing contracts, certainly no court should accomplish the same result by a mere change in its decisions.”

We assume that no one will question the doctrine thus stated. We assume that the constructions placed upon a state statute by the highest court of the state becomes a part of that statute and inheres in it.

We then have demonstrated that the right to a selection of lieu property, given by Subdivision 4, is a right to select only other property of *like character*, and that the selection in this case being a selection in lieu of living, moving, breathing animals and consisting of merchandise comprised in a general stock of clothing, is not a selection of other property of like character.

The district judge in making the order in this case, which is here to be revised, bases his holding upon a prior holding in *In re J. H. Crook*, 219 Federal, 979. In the *Crook* case, the district judge concedes that the construction of a state statute by the decision of the state court of last resort concludes the *nisi prius* Federal Court, but the district judge proceeds to dissect the decision of the Supreme Court in the 80 Washington, and notwithstanding the concession that the holding of the State Supreme Court is binding, declines to follow such holding for the reason, as the district judge says:

“I am convinced that the only thing that the court desired to say, was that money cannot be selected in lieu of the animals named in the statute.”

And this, notwithstanding that the opinion of the State Supreme Court, in the 80 Washington, is plain, as we have cited it before, and we cite it again

for the purpose of urging upon this court that language such as this, "*the words 'other property' appearing in the proviso of Subdivision 4, can refer only to other property of a like nature to that specifically mentioned under a well known rule of statutory construction.*"

Is language such as this capable of different meanings? The Supreme Court of the state evidently considered carefully each word of this selection, and it must be held to have expressed the views of that court., for it was adhered to, notwithstanding a petition for rehearing was filed.

We have then the Supreme Court of the state saying that a selection under Subdivision 4 must be of other property of like character, and the district judge saying that it need not be of other property of like character, but cannot be money.

It is of course impossible to reconcile the two decisions. The difference is as wide as the distance between the poles, and as a result we have two constructions of a statute in force in the one state. One construction placed upon it by the State Supreme Court, and the same construction placed upon it by the District Court of the United States, for the Eastern District of Washington, and the other diametrically opposed to it, placed upon it by

the district judge for the Western District of Washington.

It is a question of importance. Neither the debtor, nor the creditor, in view of this conflict between the courts knows what the law is. The rule is of one character where an execution is levied upon a judgement of a state court. The rule is of a precisely different character where bankruptcy proceedings intervene, and yet Congress has said:

“This act should not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws.”

In other words, Congress has said the state exemption statute becomes a part of the Federal bankruptcy act, and the courts almost from time immemorial have held that the construction of a state statute placed upon it by the highest court of the state becomes a part of the statute; so it has often been held where one state takes from the statute law of another state a statute, and adopts it *totidem verbis*, that it takes with it the construction placed upon such statute in the state of its original adoption, by the highest court of that state.

The district judge in his opinion in the *Crook* case discusses at some length the doctrine that the exemption statutes should be liberally construed.

We do not question in the slightest that exemption statutes have been held by almost all the courts to be statutes which should be liberally construed.

The poor unfortunate debtor is certainly entitled to a liberal construction of all acts in his favor, but such liberal construction does not authorize the courts to judicially legislate. Courts are for the purpose of construing existing statutes, not for the purpose of changing, altering, or amending existing statutes.

Here the bankrupt, on the record, did not have the animals which he was entitled to claim as exempt. He did have a general stock of merchandise, consisting of clothing from which he claimed in lieu of the animals which he did not have, specific articles of clothing, as merchandise, and not as wearing apparel, upon the ground that these articles of clothing, merchandise and not wearing apparel, were of like character with cows, calves, swine, bees, hens and roosters, and the effect of the order of the district judge, if affirmed, is to hold that coats, pants, shoes, etc., claimed as articles of merchandise, out of a stock, and not claimed as wearing apparel are of like character with cows, calves, swine, bees and domestic fowls. There can

be no other result, for concededly the Supreme Court of the state, the final arbiter in disputes of this kind, has said that the selection must be of articles of like character, and the district judge concedes that the holding of the Supreme court is conclusive, therefore it follows that clothing, inanimate and motheaten, is of like character with cows, calves, swine, bees and domestic fowls, which this court will take judicial knowledge of as being living beings.

Neither counsel in this case, nor this court, have any concern as to whether or not the decision of the Supreme Court of the state is well grounded, or not, and yet it would not be hard to support that decision by large citation of authority, but it being conceded that that decision is conclusive upon the federal courts, and the decision in itself being plain and unequivocal, we do not deem it necessary to take the time to buttress the decision of the Supreme Court of the state by citations.

It is respectfully submitted that the district judge, in his order erred; that the order of the district judge, and of the referee, if revised, must in all things be reversed, and the order of the trustee affirmed and this action is respectfully prayed for.

CASSIUS E. GATES, and
L. A. MERRICK,

Attorneys for Petitioner.

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No. 2613

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH DISTRICT

S. T. HILLS,

as Trustee of the Estate of
Max Joseph, doing business
as Workingmen's Clothing
Store, Bankrupt,

Petitioner,

vs.

MAX JOSEPH,

doing business as Working-
men's Clothing Store, Bank-
rupt,

Respondent.

No. 2613.

BRIEF OF RESPONDENT

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J. Y. KENNEDY,

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BRIEF OF RESPONDENT

STATEMENT

The respondent accepts the statement in
petitioner's brief as correct. As we view this

case there is but a single question presented for the consideration of the court, namely:

What is the correct construction to be given to the proviso contained in Subdivision 4, of Section 563, Rem. & Bal. Codes of Washington, as applied to the facts in this case?

ARGUMENT

The section of the statute in controversy is as follows:

“The following property shall be exempt from execution and attachment, except as hereinafter specially provided:

* * * 4. To each householder, two cows, with their calves, five swine, two stands of bees, thirty-six domestic fowls, and provisions and fuel for the comfortable maintenance of such householder and family for six months, also feed for such animals for six months; Provided, That in case such householder shall not possess or shall not desire to retain the animals above named, he may select from his property and retain other property not to exceed two hundred and fifty dollars, coin, in value. The selection in the proviso mentioned shall be made in the manner and by the person and at the time mentioned in subdivision three, and said selection shall have the same effect as selections made under subdivision three of this section.”

On the threshold we desire to say, that there is no controversy over the proposition that the

Federal court in its construction of the statute is controlled by the construction of the state statute by the decision of the state court of last resort.

Our position is, however, that the Supreme court of the State of Washington, has not passed on the question presented in this record.

The petitioner relies largely on the case of Creditors' Collection Association vs. Bisbee, et al., 80 Wash., 358; 141 Pacific, 886.

We will admit that a casual reading of that case without investigating the real issue there presented might lead one to the position taken in petitioner's brief. The court, speaking of Subdivision 4, of Section 563, *supra*, uses the following language:

“The words, ‘other property,’ appearing in the proviso of Subdivision 4 can refer only to **other property of a *like nature* to that specifically mentioned** under a well-known rule of statutory construction.”

A careful reading of the case, however, will convince the court that Subdivision 4, was not involved. The debtor was not selecting “other property” but was selecting “money,” and the Supreme court simply decided that money was

not "other property" as contemplated by the statute.

The correct analysis of that decision, as well as that of the other decision cited in petitioner's brief and a complete answer of the position taken by him, is given by the District court in *Re Crook et al.*, 219 Fed. 979.

The court says:

"These cases were all considered in *Re Swanson*, supra, and the decision of the state court does not change my personal view; and being concluded upon the question of the construction of a state statute by the decision of the state court of last resort (*St. Louis Southwestern Ry. Co. v. State of Arkansas*, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. Ed.—U. S. Supreme Court decision, filed December 7, 1914), and the issue being of such vital concern in the administration of bankruptcy estates, and the first impression being so radically opposite to what I believe the law to be, I have carefully examined the opinion and the cases upon which it is predicated, and am convinced that the only thing the court desired to say was that money cannot be selected in lieu of the animals named in the statute."

It is plain that the confusion, arising from these decisions so far as they effect the question involved in this case, arises from the failure of the court to distinguish between Subdivision 3, and Subdivision 4, of Rem. & Bal. Code.

Subdivision 3 after designating certain personal property as exempt add "and other household goods, utensils and furniture."

This plainly and expressly limits the claims to exemptions under this section to personal property of a specified kind, and its construction cannot in the least be controlling in considering the *lieu proviso* contained in Subdivision 4.

Your attention is called particularly to the language of Subdivision 4. It does not say:

He may select etc. other *like* property or other *similar* property or *such* other property, but he may select from his property, (all of it) and retain other property not to exceed two hundred and fifty dollars, coin, in value. (The parenthesis is ours.)

Had the legislature desired to place a limitation on the selection so as to confine it to property of like nature it could have easily used language to that effect.

The legislature saw fit to limit the selection under Subdivision 3, but it did not limit the selection under Subdivision 4.

It is plain that the only limitation intended by the legislature was to limit the selection to

personal property, which does not include money.

The real issue in Creditor's Collection Association, *supra.*, was whether money could be selected in lieu of animals; and the court held that money was not "other property" as contemplated by the statute. But it does not hold that other personal property, such as household goods, furniture and fixtures or even merchandise could not be selected under Subdivision 4.

A careful reading of that case convinces the writer that the discussion under Subdivision 4 involved was merely incidental and that the rule of *Ejusdem Generis* was not involved.

The petitioner insists that the doctrine contended for is supported by the early case of Carter vs. Davis, 6 Wash., 327; 33 Pac. 833.

The reading of this case will plainly disclose that it is not authority for the construction of Subdivision 4 *supra.*

As the Hon. District Court observes in Re Crook, *supra.*, when speaking of Carter vs. Davis, *supra.*:

"It was sought to base the exemption right as a lieu exemption upon Subdivision 3 of Sec-

tion 563, exempting to each householder certain enumerated animals and 'other household goods, utensils, and furniture, not exceeding \$500 coin in value.' This contention was denied; the court holding that no right was conferred upon the debtor to retain other property of a different character in lieu of that authorized to be retained as exempt."

The writer has no quarrel with the Supreme court in its construction of Subdivision 3 *supra*, because the language of the statute expressly makes its own limitation.

The laws of Washington divide exemptions into two general classes; from real property and from personal property and a general lieu provision restricts the selection to one or the other of these general classes; that is, real property or personal property, and in order to restrict the limitation to any particular kind of property within either of the two general classes it is necessary to make further limitation as was done in Subdivision 3 *supra*, but not in Subdivision 4 *supra*.

It is universally held the exemption statute will be liberally construed to effectuate the object for which they were designed, namely: "to prevent a householder and his family from being deprived of its immediate means of subsistence."

In this case the bankrupt did not possess any of the animals mentioned in Subdivision 4 supra. We do not contend that the merchandise selected is of like kind or character as that enumerated in Subdivision 4 supra.

The construction urged by petitioner would render the statute ridiculous.

It is very plain that if the debtor did possess the animals mentioned in Subdivision 4, then he could not select other animals of the same nature; if he did not have two cows with their calves, or five swine, he could not select two other cows with their calves, or five other swine.

The same is true of the domestic fowls and this would render the section absolutely void in about sixty per cent of the cases. In fact, in all of them excepting possibly the farmers and they might select guinea pigs, rabbits or pigeons, or possibly canary birds, under the construction contended for by petitioner.

Counsel observes, however, that this court has no concern as to whether or not the decision of the Supreme court is well grounded. This is true but this does not mean that the court should follow the "blind leader of the blind" without determining what the Supreme court of

the State actually passed upon, or what the true issue was there presented.

We do not believe it is necessary to extend this brief further. We have examined all of the cases relied upon by petitioner and we are sanguine from a careful reading of the same that they do not support the position for which he contends.

We believe they have fallen into error by confusing the proper construction to be given to two distinct sections of the statute. The very nature of the bankrupt business was such that the selection of these goods was necessary for the maintenance of himself and his family. It provided him with at least a nucleus to start again in business and affords him the beneficent protection for which exemption laws are passed.

It is therefore respectfully submitted that the Referee and the District Judge were both correct in their order allowing the bankrupt his exemptions, and that the same should be affirmed.

Respectfully submitted,
J. Y. KENNEDY &
S. A. BOSTWICK,
Attorneys for Respondent.



